11-20-2012

Hoch v. Vance Clerk's Record v. 2 Dckt. 39788

Vol 2 of 3

LAW CLERK

In the
SUPREME COURT
of the
STATE OF IDAHO

JOHN M. HOCH and CAROLE D. HOCH, husband and wife,
Plaintiffs-Respondents,

v.

ROB VANCE and BECKY VANCE, husband and wife,
Defendants-Appellants,

And

JAKE SWEET and AUDREY SWEET, husband and wife,
Defendants.

CLERK'S RECORD ON APPEAL

VOLUME II

Appealed from the District Court of the
Second Judicial District of the State of Idaho,
in and for the County of Nez Perce

The Honorable JEFF M. BRUDIE

Supreme Court No. 39788

W. JEREMY CARR
ATTORNEY FOR DEFENDANTS-APPELLANTS

THEODORE CREASON
ATTORNEY FOR PLAINTIFFS-RESPONDENTS

39788

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCK and CAROLE D. HOCH, husband and wife, Plaintiffs-Respondents, v. ROB VANCE and BECKY VANCE, Husband and wife, Defendants-Appellants, And JAKE SWEET and AUDREY SWEET, Husband and wife, Defendants.	SUPREME COURT NO. 39788 TABLE OF CONTENTS

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	Case No. CV08-2272 **PLAINTIFFS' REPLY TO DEFENDANTS' JAKE AND AUDREY SWEET'S REPLY MEMORANDUM TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' VANCE'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

COME NOW the plaintiffs, John M. Hoch and Carole D. Hoch, husband and wife, by and through their attorney, Theodore O. Creason of Creason, Moore & Dokken, PLLC, and hereby submit this Reply to Defendants' Jake & Audrey Sweet's Reply Memorandum to Plaintiffs' Motion for Summary Judgment and Defendants' Vance's Memorandum in Opposition to Motion for Summary Judgment.

I. BACKGROUND

Please see Memorandum in Support of Plaintiff's Motion for Summary Judgment and Plaintiff's Verified Complaint to Enjoin Defendants From Obstructing Easement, Attached as **Exhibits 1 & 2**.

II. STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the court indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *Baxter v. Craney*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). The moving party carries the burden of proving the absence of a genuine issue of material fact. *Baxter*, 135 Idaho at 170, 16 P.3d at 267. In opposing a motion for summary judgment, however, the nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or . . . otherwise . . . , must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. Rule 56(e); *Baxter*, 135 Idaho at 170, 16 P.3d at 267. "A mere scintilla of evidence is not enough to create a genuine issue of fact." *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). Further, "[c]reating only a slight doubt as to the facts will not defeat a summary judgment motion; a summary judgment will be granted whenever on the basis of the evidence before the court a directed verdict would be warranted or whenever reasonable minds could not disagree as to the facts." *Snake River Equip. Co. v. Christensen,* 107 Idaho 541, 549, 691 P.2d 787, 795 (1984). To be considered by the court, the evidence offered in support of or in opposition to a motion

for summary judgment must be admissible. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

III. ARGUMENT AND AUTHORITIES

1. THE HOCHS WERE GRANTED AN EXPRESS EASEMENT FOR ACCESS OVER THE UPPER ROAD IN THEIR WARRANTY DEED.

In their responses to Hochs' motion for summary judgment, the Vances and Sweets raise several arguments. Initially, they argue the term "roadway" contained in the deeds conveying the parcels to the Vances and Sweets is ambiguous. In addition, they make several assertions purporting to establish that genuine issues of material fact exist that preclude summary judgment. Specifically, they argue there is a genuine issue of material fact as to: the existence of the upper road at the time of the conveyances, the character of the easement as appurtenant or in gross, what constitutes the dominant estate, and whether the Vance and Sweet deeds created two separate easements. For the following reasons, the defendants' arguments as to the express easement are unpersuasive.[1]

a. The Use of the Term "Roadway" Does not Render the Easement Ambiguous and, Therefore, Extrinsic Evidence is Inadmissible.

The warranty deed Cridlebaugh granted to the Hochs provided the 20 acre parcel was being conveyed:

[1] The Hochs concede, however, that genuine issues of material fact exist with respect to their claims for an easement implied from prior use and by necessity. Although the Hochs still maintain an easement exists on those theories, they acknowledge the defendants have raised factual issues that must be decided before the Court may render judgment in favor of the Hochs based upon those theories.

> Subject to and together with the rights and responsibilities set forth in the following easements:
>
> . . .
>
> Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho. [deed to the Vances]
>
> Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho. [deed to the Sweets]

(Pls. Verified Compl. 4-5.) The referenced deeds to the Sweets and Vances provide:

> Reserving unto the grantor, his heirs and assigns, all easements for ingress and egress running from public right of way to the above described property which are appurtenances to said real property, together with *an easement over and across all roadways presently existing on the property herein being conveyed.*

Exhibits 3 & 4. The Sweets argue the term roadway as used in the conveyances is ambiguous because it "is unclear whether the term . . . would include an unimproved route" or was referencing only those roads "actually in use at the time of the execution of the deed." (Sweet's Response 8.).

The Sweets' argument is unconvincing. The deeds do not impose any conditions on what constitutes a roadway. Had the deeds been designed to only reserve an easement over improved roads or roads currently in use they would have indicated as much. Because the deeds do not limit the easement to improved roads or roads currently in use, they should not be construed in such a limited manner. The imposition of restrictions on an easement by a court is only permissible in regards to the use or scope of an

easement. *See Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 712 (Ct. App. 1992) (permitting court to impose restrictions not contained in the easement with respect to the purposes for which the easement could be used). Imposing restrictions on the scope of an easement is permissible since the dominant estate owner may only use the easement in a manner that is consistent with the servient estate owner's enjoyment of the property. *Quinn v. Stone,* 75 Idaho 243, 246, 270 P.2d 825, 827 (1954) ("'When the right of way is not bounded in the grant, the law bounds it by the line of reasonable enjoyment.' This means 'that the easement must be a convenient and suitable way and must not unreasonably interfere with the rights of the owner of the servient estate.'" (quoting *Ingelson v. Olson,* 272 N.W. 270, 274 (Minn. 1937))); *Backman v. Lawrence*, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009); *Shultz v. Atkins,* 97 Idaho 770, 773, 554 P.2d 948, 951 (1976). The Sweets have cited no authority that authorizes courts to limit the grant of easement itself. As such, the Court should reject the Sweets' attempt negate the grant of easement contained in the deeds.

Moreover, the phrase "all roadways" is not ambiguous and included the upper road. Neither defendant has presented a valid argument in support of the proposition that the term "roadway" would not include the upper road. Black's Law Dictionary defines a "road" as "a strip of land appropriated and used for purposes of travel and communication between different places." Black's Law Dictionary (5th ed. 1979). The undisputed evidence indicates the upper road satisfies this definition as it was a strip of land used for purposes of travel over the 90 acre parcel. Both defendants admit that the upper road could be used for purposes of travel at the time they purchased their property.

They simply assert that the road was not traversable by car. As discussed above, however, that fact is not determinative. Nothing in the reservation of easement limits the reservation to roadways in pristine condition, improved roads, paved roads, graveled roads, or those traversable by two wheel drive vehicles. Instead, the reservation created an access easement for traveling over the Sweets' and Vances' properties. By Sweet's own admission, the upper road was capable of being traveled – one just had to drive "carefully between the trees." (Aff. of Jake Sweet 2.)

In addition, the Sweets argue that the term "all roadways presently existing on the property" is ambiguous because it "does not specify the locations or dimensions of the roads." (Sweet Response 7.) The only case the Sweets cite for the proposition that an easement is ambiguous unless its dimensions are described with particularity in the conveyance is from Wyoming and, thus, is not controlling on this Court. In any event, the decision does not stand for the proposition the Sweets rely upon it for. Rather than addressing the existence of an easement itself, the decision pertains to ambiguities in an easement description. *See R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 586 (Wyo. 1999). The existence and description of an easement are two separate and distinct issues. 81 Am. Jur. *Proof of Facts* 3d 199 (2009) (indicating that the extent, scope, or dimensions of an easement are issues separate and apart from the existence of the easement itself); *Bethel v. Van Stone*, 120 Idaho 522, 524, 817 P.2d 188, 190 (Ct. App. 1991) ("We uphold the Bethels' right to an easement but remand for entry of an amended judgment fixing and describing the location of the easement."); *see also Quinn,* 75 Idaho at 246-47, 270 P.2d at 826 ("[W]here a conveyance of a right of way does not definitely

fix its location, the grantee is entitled to a convenient, reasonable, and accessible way within the limits of the grant."). The lack of a precise description does not establish a genuine issue of fact as to whether a road actually existed or whether the Hoch's were granted an easement.

At this point, the Hochs are only requesting summary judgment on the issue of the existence of the easement itself. They are not seeking a ruling on the precise dimensions and location of the road. The Court can later issue a judgment specifying the scope of the easement. *See Harwood v. Talbert*, 136 Idaho 672, 678, 39 P.3d 612, 618 (2001) (upholding district court's grant of partial summary judgment on issue of whether an express easement existed and subsequent bench trial on the issue of the scope of the easement). Accordingly, the Sweets' attempt to utilize the lack of a precise description of the dimensions of the easement to challenge the grant of easement itself must fail.

The Vances also argue that the reservation of an easement over "all roadways presently existing" is ambiguous. They contend that the reservation arguably only pertained to the lower road since that is the only road specifically mentioned in all of the deeds. In making their argument, the Vances rely on Cridlebaugh's deposition testimony indicating that he did not intend to grant the Hochs an easement over the upper road.

The Court should reject the Vances' proffered interpretation of the deeds. Although the circumstances surrounding the grant of an easement may sometimes be considered in construing the instrument, such evidence may only be relied upon when the language of the instrument is ambiguous. *Porter v. Bassett*, 146 Idaho 399, 404, 195

P.3d 1212, 1217 (2008). Here, the language in the deeds to the Vances and Sweets is not ambiguous. Both the Sweet and Vance deeds reserve an easement "across all *roadways* presently existing on the property herein being conveyed." **Exhibits 3 & 4.** By using the plural term "roadways" it is clear the instruments were not intended to reserve an easement over a single road. It would be unreasonable to conclude that use of the plural "roadways" in the reservations was intended to reserve an easement over a single road. The deeds are therefore unambiguous in this regard and extrinsic evidence may not be relied upon to contradict their plain language. Cridlebaugh's deposition testimony attempting to directly contradict the terms of the deed is inadmissible.[2]

Nothing about the language in the reservation or grant of easement over the upper road is ambiguous. Because the upper road was in existence at the time the parcels were subdivided, Cridlebaugh reserved an easement over the road by virtue of the deeds to the Sweets and Vances. Cridlebaugh conveyed that easement to the Hochs by referencing the easement in their deed.

Nonetheless, as mentioned above, in making their various arguments, both parties maintain Cridlebaugh's intent and other extrinsic evidence should be considered in determining whether the Hochs were granted an easement over the upper road. Although the court's primary goal in interpreting a deed of conveyance is to give effect to the parties' intent, such intent may be settled as a matter of law based upon the plain

[2] In any event, Cridlebaugh's deposition testimony indicates he intended to reserve himself an easement over the upper road. (Cridlebaugh Dep. 49.) The only question his testimony raised pertained to granting such an easement to the Hochs. As discussed below, however, because the easement was appurtenant, it is attached to the Hochs' property.

language of the document when the language is unambiguous. *Porter*, 146 Idaho at 404, 195 P.3d at 1217. The parties' intent only becomes a question of fact when the language in the deed is ambiguous. *Id.* Language will be regarded as ambiguous when it is subject to reasonable conflicting interpretations. *Id.* When language is ambiguous, the trier of fact must determine the parties' intent based upon the language of the conveyance and the surrounding circumstances. *Id.*; *Bethel*, 120 Idaho at 525, 817 P.2d at 191 ("An instrument which is reasonably subject to conflicting interpretation is ambiguous.... When an instrument is ambiguous in nature, the intention of the parties as reflected by all of the circumstances in existence at the time the easement was given must be considered in construing the granting instrument.").

Because the deeds in this case are unambiguous, extrinsic evidence may not be utilized by the Court in determining whether the Hochs obtained an easement over the upper road. Although intent may become relevant when the Court is faced with deciding the scope and dimensions of the easement since they are not precisely identified in the instrument, at this point, extrinsic evidence is inadmissible. *See R.C.R., Inc.*, 978 P.2d at 586. ("If the terms of description are inadequate or nonexistent, then extrinsic evidence may be considered to ascertain the intent of the parties as to the location and dimensions of the easement."). Pursuant to the unambiguous terms of the deeds, the Hochs obtained an express easement over all existing roads on the Sweet and Vance properties. This necessarily included the upper road.

b. There is No Genuine Issues of Material Fact as to the Existence of the Upper Road at the Time the Property was Subdivided.

Next, the defendants argue that the Hochs did not obtain an easement over the upper road because the road was not in existence at the time the 90 acre tract was subdivided. Alternatively, they argue that there is a genuine issue of material fact as to whether the road existed. Under this theory, if the upper road did not exist at the time the property was conveyed to them it was not an "existing roadway" over which Cridlebaugh retained an easement that he could subsequently grant to the Hochs.

Contrary to the defendants' assertion, there is no genuine issue of material fact regarding the existence of the upper road at the time of the conveyances. The evidence clearly indicates the upper road existed at the time Cridlebaugh began subdividing the property. (Cridlebaugh Dep. 9, 20.) In fact, the road existed before Cridlebaugh even purchased the 90 acre tract, although it was admittedly a dirt road. *Id.* at 19. In reference to the upper road, Cridlebaugh admitted in his deposition that:

> It was just a dirt road. Nobody graveled it or anything. It traveled from, well, from my property through Sweets, and originally the road made a loop before I bought it. It came up Buckboard Lane and crossed in a westerly direction in front of Vances, made a loop out toward the Hochs' property and then went right back . . . out to my ten acres.

Id. He further indicated that the road was an access road, then went on to testify:

> Q. Okay. At the time you sold the property to both Vance and to Sweet, both the upper and the lower roads were in place; correct?
>
> A. Correct.
>
> Q. And, and Teats had bladed the, both of those roads, correct?

A. Yeah.

Q. And they were passable, certainly by a pickup truck?

A. Yes.

...

Q. All right. Was it your intention when you first deeded property to Jake and Audrey Sweet to retain, for yourself anyway, an easement on both the lower and the upper road?

A. Yes.

Id. at 20, 48-49. Based upon this testimony, it is clear the upper road existed at the time of all three of the conveyances.

Nonetheless, both defendants attempt to argue the upper road did not exist until 2004. Their own construction of the facts, however, undermines their assertion. In his affidavit in opposition to the Hochs' motion for summary judgment, Jake Sweet admits, with respect to the upper road, that "[y]ou could drive a pickup truck carefully between the trees on what appeared to be ATV trails that were not connected or skidder trails that had been used when the property had been logged." (Aff. of Jake Sweet 2.) Becky Vance represents in her affidavit that "it was not possible for *a car* to access Mr. and Mrs. Hoch's property by the 'upper road'" prior to 2003 or 2004. (Aff. of Becky Vance 2, para. 6) (emphasis added).

Neither the Vances nor the Sweets presented any evidence to indicate the upper road did not exist at the time of the conveyances. Their reliance on the fact that the upper road was not traversable by car at the time of the conveyances is misplaced. As

discussed above, the term "roadway" is not limited to improved roads traversable by car. Both defendants admit (although the Vances' only implicitly) that trucks could utilize the road. In addition, the Sweets admit that the upper road was accessible before they began improving it. Jake Sweet testified in his affidavit that he and his wife "began to *improve* access across Weinert and Cridlebaugh's property to our property by removing trees and blading a somewhat straight route to our property." (Aff. of Jake Sweet 2) (emphasis added). One cannot improve something that does not already exist. If the road did not exist until 2004 as the Sweets maintain, they would have had to construct new access, rather than improve existing access. Further, the Sweets admit that Cridlebaugh granted them an easement over the upper road in the deed conveying them the 40 acre parcel. *See* (Sweets' Response 4) ("The Sweet Deed provides in three paragraphs the easements at issue here. The first paragraph sets over to Sweet what is commonly referred to as the 'upper road.'"). Because the Sweets obtained title to the property in 2001 and the upper road was specifically referenced in their deed, it is disingenuous for them to argue the road did not exist until 2004. Finally, Cridlebaugh clearly testified the road existed at the time he purchased the property. (Cridlebaugh Dep. 20, 48-49.) In light of these facts, it is evident that what the defendants' assertion essentially comes down to is that the upper road was not in as good of condition at the time of the conveyances as it is today.

Because it is undisputed that the upper road could be utilized, albeit by truck, at the time of the conveyances, there is no genuine issue of material fact as to its existence. Although the road may not have been in the best condition before it was

improved by the Sweets, it was in existence at the time the properties were conveyed to the Vances, Sweets, and Hochs. Accordingly, the Hochs have an access easement over the upper road. The only fact that remains to be determined is the scope of the access easement granted to the Hochs – not its existence.

c. No Genuine Issue of Material Fact Exists With Respect to the Appurtenant Nature of the Easement.

The defendants argue that, even if Cridlebaugh did reserve an easement over the upper road, the easement was in gross and, thus, was not transferred to the Hochs by their deed. In making this argument, the defendants rely on the fact that their deed specifically indicates that the easement for ingress and egress is appurtenant while the reservation of an easement over all other existing roadways contains no such reference.

An appurtenant easement establishes a right to use a certain piece of property (the servient estate) for the benefit of another piece of property (the dominant estate). *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003). The rights stemming from an appurtenant easement attach to the dominant estate and cannot be separated from the land. *Id.* Because such easements are fixed to the real property, they run with the land and may be claimed by the original easement owner's successors-in-interest. *Id.*; I.C. § 55-603; *see also Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005) ("One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement." (quoting *Checketts v. Thompson,* 65 Idaho 715, 721, 152 P.2d 585, 587 (1944))). In Idaho, easements are presumed to be

appurtenant. *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. There is no requirement that easements be referred to as such for the presumption to arise. If there were, there would be no need for the presumption. The fact that one easement contained in a deed is referred to as appurtenant and another is not is insufficient to overcome the presumption. *See* 25 Am. Jur. 2d *Easements and Licenses* § 10 (2009) ("An easement may be considered appurtenant if it is so in fact, even though not declared to be so in deed.").

Contrary to the defendants' assertion, Cridlebaugh reserved an appurtenant easement over the upper road. Cridlebaugh's use of the phrase "appurtenant" to describe the easements for ingress and egress can best be explained by the fact that those easements already existed as appurtenances to the property. The easement over "all roadways presently existing," on the other hand, was not yet an appurtenance to the property because it was being created by the reservation. As such, it was not referred to as an appurtenance in the deeds.

The appurtenant nature of the easement over the upper road is further demonstrated by the language reserving the easement to the "grantor, his heirs and assigns." **Exhibits 3 & 4**. The Idaho Court of Appeals have recognized that use of the phrase "heirs and assigns" in a grant or reservation of easement demonstrates that the easement is appurtenant. *See, e.g., Boydstun Beach Ass'n v. Allen*, 111 Idaho 370, 375, 723 P.2d 914, 919 (Ct. App. 1986) (concluding presumption of appurtenance was not overcome where easement was granted to the plaintiff and his "heirs and assigns"

because the phrase "'generally comprehends all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law'" (quoting Black's Law Dictionary 109 (5th ed. 1979))). In light of these considerations, it is clear Cridlebaugh reserved an appurtenant easement over the upper road. Because the easement is appurtenant, it was not a personal right belonging to Cridlebaugh; but instead, remains attached to the dominant estate. As such, by purchasing the dominant estate, the Hochs obtained the easement regardless of whether it was specifically mentioned in their deed. *See* 81 Am. Jur. *Proof of Facts* 3d 199 (2009) ("An appurtenant easement for right of way purposes passes with subsequent conveyances, even if the specific language of the right of way is not repeated in the deed.").

d. Because the Easement Over the Upper the Road is Appurtenant, it Was Not Necessary that it be Specifically Mentioned in the Hochs' Deed to be Conveyed.

The Vances argue that Cridlebaugh reserved two separate easements in his grants to the Vances and Sweets: one for ingress and egress and one over all existing roadways. According to the Vances, the deed from Cridlebaugh to the Hochs only conveyed the easement for ingress and egress, which was over the lower road. The Vances maintain the deed to the Hochs did not convey an easement over other existing roadways and, therefore, the Hochs do not have an easement over the upper road.

The Vances' argument is unconvincing because the easement Cridlebaugh reserved over all existing roadways was an appurtenant easement that cannot be separated

from the real property. As discussed above, in Idaho, when the nature of an easement is unclear, courts will presume the easement is appurtenant. *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. Because appurtenant easements are attached to the land, they need not be specifically mentioned in a deed to be conveyed with the property. *See Bothwell v. Keefer*, 53 Idaho 658, 27 P.2d 65, 66 (1933) ("And the general rule is that, where an easement is annexed to land, either by grant or prescription, it passes as an appurtenance with the conveyance 'of the dominant estate, although not specifically mentioned' in the deed, or even without the use of the term 'appurtenances,' 'unless expressly reserved from the operation of the grant.'" (quoting *Johnson v. Gustafson*, 49 Idaho 376, 288 P. 427, 429 (1930))); *Joyce Livestock Co. v. United States*, 144 Idaho 1, 13, 156 P.3d 502, 514 (2007) (noting that a water right passes "with the property to which it is appurtenant even though not mentioned in the deed, [based on] analogy from the law applicable to easements").

Here, there has been no evidence presented to rebut the presumption that the easement over the upper road was an easement appurtenant. Instead, for the reasons elaborated above, several facts demonstrate the easement Cridlebaugh reserved over all existing roadways was appurtenant to the property purchased by the Hochs. Accordingly, even if the language of reservation in the Sweet and Vance Deeds is construed to create two distinct easements as the Vances suggest, the Hochs still obtained an access easement over the upper road when they purchased the property. Because the easement was appurtenant, the easement over the upper road was included in the conveyance to the Hochs and they are entitled to summary judgment.

e. There is No Genuine Issue of Material Fact that the Hochs are the Owners of the Dominant Estate.

Next, the Sweets argue it is unclear whether the Hochs are the owners of the dominant estate. They maintain that, because their deed is ambiguous as to what property constitutes the dominant estate, the reference in the Hoch Deed to the Sweet Deed "perpetuates" the ambiguity.

The Sweets' argument that it is unclear what property is the dominant estate lacks credibility. The easement, being one of reservation, unmistakably and conclusively establishes the property retained by the grantor as the dominant estate. Cridlebaugh originally owned 90 acres of property. Each deed contained a description of the property being conveyed. There was never any question as to the property Cridlebaugh was retaining for himself. Consequently, the dominant estate was never in question. Accordingly, this theory advanced by the Sweets is not a basis for denying the Hochs' motion for summary judgment.[3] Cridlebaugh subsequently conveyed the dominant estate to the Hochs by Warranty Deed. **Exhibit 5**.

[3] In any event, this argument by the Sweets is disingenuous since they admit to the existence of a dominant and servient estate in their discussion regarding an easement by necessity. *See* (Sweet's Reply 15) ("Sweet's offer to provide a route which did not permit Hoch's travel in front of Sweet's residence is consistent with the servient property owner's ability to use his property consistent with the easement granted.").

2. THE HOCHS HAVE NOT REQUESTED SUMMARY JUDGMENT BASED UPON THE THEORY OF A PRESCRIPTIVE EASEMENT AND DO NOT DISPUTE THE SWEETS' ARGUMENT THAT A PRESCRIPTIVE EASEMENT DOES NOT EXIST.

The Hochs do not dispute the Sweets' argument that they do not have an easement over the upper road based upon a prescriptive easement theory. The Hochs did not rely on that theory in their motion for summary judgment and do not intend to do so now or in the future.

3. THE HOCHS CONCEDE THAT THE DEFENDANTS HAVE RAISED GENUINE ISSUES OF MATERIAL FACT WITH RESPECT TO THEIR CLAIMS FOR AN EASEMENT IMPLIED BY NECESSITY AND PRIOR USE.

The Hochs maintain that they are entitled to an easement over the upper road based upon the theories of easement implied from prior use and easement by necessity. Because the defendants have raised factual issues relevant to the elements necessary to prove such easements, however, the Hochs concede they are not entitled to summary judgment based upon those theories. In the event the Hochs' motion for summary judgment on their express easement theory is denied, however, the Hochs will seek a trial on the implied easement theories. At that time, the factual issues of necessity, expense, prior use, and prejudice may be determined.

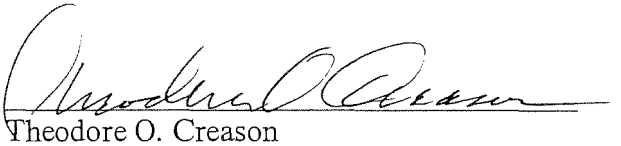
IV. CONCLUSION

The Hochs' motion for summary judgment based on the theory of an express easement should be granted. Because the upper road existed at the time of the first grant to the Vances in October 2000, the Hochs have an appurtenant access easement over the

road. Alternatively, should the Court conclude there is a genuine issue of material fact as to the existence of the road at the time of the conveyance to the Vances, the Hochs request a grant of partial summary judgment recognizing that, should the trier of fact determine the upper road did exist, the Hochs have an easement over the road. Judgment would then be entered in favor of the Hochs once the factual issues regarding the existence and location of the road were decided.

DATED this 25th day of November, 2009.

CREASON, MOORE & DOKKEN, PLLC



Theodore O. Creason
Attorneys for Plaintiffs
John M. Hoch and Carole D. Hoch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of October, 2009, a copy of the foregoing PLAINTIFFS' REPLY TO DEFENDANTS' JAKE AND AUDREY SWEET'S REPLY MEMORANDUM TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' VANCES MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT was served by the method indicated below and addressed to the following:

Edwin L. Litteneker Attorney at Law P. O. Box 321 322 Main Street Lewiston, ID 83501	X _____ _____ _____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION
W. Jeremy Carr Clark and Feeney 1229 Main Street P. O. Drawer 285 Lewiston, ID 83501	X _____ _____ _____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION

Theodore O. Creason, ISB #1563

EXHIBIT 1

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	Case No. CV08-2272 **MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

The plaintiffs, John M. Hoch and Carole D. Hoch (hereinafter "the Hochs"), by and through their counsel of record, Theodore O. Creason, of Creason, Moore & Dokken, PLLC, hereby submit their Memorandum in Support of Plaintiff's Motion for Summary Judgment.

I. FACTS AND PROCEDURE

Jack Cridlebaugh was the owner of 90 acres of real property in Waha, Idaho. (Cridlebaugh Dep. 6.) In 2000, Cridlebaugh subdivided the property into four parcels. *Id.*

Three of the parcels were sold over the course of three years: Rob and Becky Vance purchased 20 acres on October 12, 2000, Jake and Audrey Sweet purchased 40 acres on October 10, 2001, and John and Carole Hoch purchased 20 acres on March 26, 2002. Cridlebaugh retained ownership of the remaining 10 acres. (Pls. Verified Compl. 3-4.)

In conveying the three parcels, Cridlebaugh granted and reserved several easements over each piece of property. *Id.* Of particular significance, Cridlebaugh reserved an easement over Black Bear Bend, also known as the upper road, which was used to access the property eventually sold to the Hochs.[1] The warranty deed Cridlebaugh granted to the Vances, Instrument No. 657867, stated:

> Reserving unto the grantor, his heirs and assigns, all easements for ingress and egress running from the public right of way to the above described property which are appurtenances to said real property, together with *an easement over and across all roadways presently existing on the property herein being conveyed.*

Id. at 3 & Exh. A. The warranty deed conveying property to the Sweets, Instrument No. 668025, contained the same provision. *Id.* at 4 & Exh. B. Thus, pursuant to the warranty deeds, Cridlebaugh retained easements over all roads on the 90 acre tract that were in existence at the time of conveyance. It is undisputed that the upper road used to access the Hochs' property existed at the time of conveyance. (Cridlebaugh Dep. 20.)

When Cridlebaugh subsequently conveyed the 20 acre parcel to the Hochs, he granted them an access easement over the upper road. The warranty deed Cridlebaugh granted to the Hochs provided the 20 acre parcel was being conveyed:

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[1] The upper road crosses over the northeast portion of the Sweet property and the southwest corner of the Vance property.

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> Subject to and together with the rights and responsibilities set forth in the following easements:
>
> ...
>
> Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 16, 200 as Instrument No. 657867, records of Nez Perce County, Idaho. [deed to the Vances]
>
> Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho. [deed to the Sweets]

(Pls. Verified Compl. 4-5.) Based on this language in the warranty deed, the Hochs purchased the property believing they would be able to access their property by using the upper road. Although there was a lower road that also led to the Hochs' property, the road was not passable during the winter months and, at all other times, it was only accessible in a four wheel drive vehicle. (Cridlebaugh Dep. 46-47.)

Immediately after purchasing the property, the Hochs began using the upper road for access. In addition, the road was used to deliver construction materials and equipment to the property. The Hochs continued to use and maintain the road from 2002 until November 2007.[2] At that point, after five years of using the road, the Hochs received a letter from the Sweets indicating that they were terminating the easement over the portion of the upper road that traversed their property on June 30, 2008. (*See* Pls. Verified Compl. Exh. D.) According to the Sweets, the Hochs only had a revocable license to use the upper road while their home was being constructed. *Id.* Once construction was completed, the Sweets maintained the Hochs would only be permitted to use a newly constructed road, known as New Hoch Access, to access their property.[3] In support of their position, the Sweets argued that Cridlebaugh

[2] The Hochs maintained the road by gravelling it whenever necessary.
[3] The new road went through both Cridlebaugh's and the Sweets' properties, then connected to the lower road and, thus, did not avoid the winter access problems.

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never intended to grant the Hochs an easement over the upper road. At his deposition, however, Cridlebaugh admitted that he retained easements over both the upper and lower roads when he conveyed the property to the Hochs. *Id.* at 9, 19-20, 48, 50.

The Hochs responded to the Sweets' letter and informed them that they intended to continue using the upper road for access in light of their easement over the road. Since that time, however, the Sweets have blocked the Hochs' access to the road on several occasions. (Pls. Verified Compl. 5.) The Sweets have used bull dozers, rock berms, and berms of ice to restrict the Hochs' access. These actions have deprived the Hochs of access to their property during the winter months when the lower road is impassable.

In an effort to resolve the easement dispute, the Hochs filed a complaint seeking an injunction prohibiting the Sweets and Vances from interfering with their use of the upper road easement. The Vances filed a counterclaim asserting a claim for trespass based on the presence of certain improvements the Hochs made to what turned out to be the Vances' property. The parties engaged in mediation, during which the Vance's trespass claim was resolved. The parties were unable to resolve the easement dispute. The Hochs' are now seeking summary judgment on their claim to enjoin the defendants from interfering with the Hochs' access easement.

II. ISSUE

A. Whether the Hochs have an access easement over the upper road.

III. ARGUMENTS AND AUTHORITIES

A. STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings, affidavits, and discovery documents before the court indicate that no genuine issue of material fact exists and that

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the moving party is entitled to judgment as a matter of law. Idaho R. Civ. P. 56(c); *Baxter*, 135 Idaho 166, 170, 16 P.3d 263, 267 (2000). The moving party carries the burden of proving the absence of a genuine issue of material fact. *Baxter*, 135 Idaho at 170, 16 P.3d at 267. In opposing a motion for summary judgment, however, the nonmoving party "may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or . . . otherwise . . . , must set forth specific facts showing that there is a genuine issue for trial." Idaho R. Civ. P. Rule 56(e); *Baxter*, 135 Idaho at 170, 16 P.3d at 267. "A mere scintilla of evidence is not enough to create a genuine issue of fact." *Tingley v. Harrison*, 125 Idaho 86, 89, 867 P.2d 960, 963 (1994). To be considered by the court, the evidence offered in support of or in opposition to a motion for summary judgment must be admissible. *Bromley v. Garey*, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

Once the moving party has shown the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996). "Creating only a slight doubt as to the facts will not defeat a summary judgment motion; a summary judgment will be granted whenever on the basis of the evidence before the court a directed verdict would be warranted or whenever reasonable minds could not disagree as to the facts." *Snake River Equipment Co. v. Christensen*, 107 Idaho 541, 549, 691 P.2d 787, 795 (1984). If the adverse party does not respond, summary judgment, if appropriate, shall be entered against the party. I.R.C.P. 56(e).

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PLAINTIFFS' REPLY TO DEFENDANTS' SWEETS' REPLY MEMORANDUM

B. THE HOCHS HAVE AN ACCESS EASEMENT OVER THE UPPER ROAD BASED ON THE THEORIES OF EXPRESS EASEMENT, EASEMENT IMPLIED BY NECCESSITY, AND EASEMENT IMPLIED FROM PRIOR USE.

An easement is an interest in real property that gives the easement owner "the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Backman v. Lawrence*, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009); *Shultz v. Atkins,* 97 Idaho 770, 773, 554 P.2d 948, 951 (1976). Easements may be created in one of three ways: by express agreement, implication, or prescription. *Shultz*, 97 Idaho at 773, 554 P.2d at 951. Easements exist in two general forms: easements appurtenant and easements in gross. *Hodgins v. Sales*, 139 Idaho 225, 230, 76 P.3d 969, 974 (2003). An appurtenant easement establishes a right to use a certain piece of property (the servient estate) for the benefit of another piece of property (the dominant estate). *Id.* The rights stemming from an appurtenant easement attach to the dominant estate and cannot be separated from the land. *Id.* Because such easements are fixed to the real property, they run with the land and may be claimed by the original easement owner's successors-in-interest. *Id.*; I.C. § 55-603; *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005) ("One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement." (quoting *Checketts v. Thompson,* 65 Idaho 715, 721, 152 P.2d 585, 587 (1944))). An easement in gross, on the other hand, exists independent of an interest in land. *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. Such easements benefit the easement owner personally and do not attach to a particular piece of property. *Id.* In Idaho, when the nature of an easement is unclear,

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courts will presume the easement is appurtenant. *Id.* Here, the Hochs have an appurtenant easement over the access road under the rules regarding both express easements and easements by implication.

1. The Warranty Deed Conveying the Property to the Hochs Granted Them an express easement over the upper road for purposes of accessing their property.

Express easements may be created by exception or reservation. *Akers*, 142 Idaho at 301, 127 P.3d at 204. An easement by reservation occurs when the grantor reserves to himself "some new right in the property being conveyed." *Id.* An easement by exception is created when the grantor "withhold[s] title to a portion of the conveyed property." *Id.* Either type of express easement may be created by deed. *Lawrence*, 143 Idaho at 714, 152 P.3d at 586.

Under the statute of frauds, to create an easement by express agreement, there must be a writing reflecting the parties' agreement. *Shultz*, 97 Idaho at 773, 554 P.2d at 951; *Bob Daniels and Sons v. Weaver*, 106 Idaho 535, 541, 681 P.2d 1010, 1016 (Ct. App. 1984); *see also* I.C. §§ 9-505 & 9-503. "No particular forms or words of art are necessary [to create an express easement]; it is necessary only that the parties make clear their intention to establish a servitude." *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 714, 152 P.3d 581, 585 (2007) (quoting *Benninger v. Derifield,* 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006)). An attempted grant of an easement that fails to comply with the writing requirement is unenforceable in courts of law and equity. *Weaver*, 106 Idaho at 541, 681 P.2d at 1016.

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In determining whether an express easement was created, courts seek to carry out the intent of the parties. *Phillips Indus., Inc. v. Firkins,* 121 Idaho 693, 696-97, 827 P.2d 706, 709-10 (Ct. App. 1992). When the language of a deed is plain and unambiguous, the court need not look beyond the four corners of the document to determine the parties' intent. *Id.* at 697, 827 P.2d at 710. Under such circumstances, parol evidence is inadmissible to prove the parties' intent or to contradict the terms of the written agreement. *Id.*; *Cannon v. Perry*, 144 Idaho 728, 731, 170 P.3d 393, 396 (2007) ("Under the parol evidence rule, when a contract has been reduced to a writing that the parties intend to be a final statement of their agreement, evidence of any prior or contemporaneous agreements or understandings which relate to the same subject matter is not admissible to vary, contradict, or enlarge the terms of the written contract."); *McKoon v. Hathaway*, 146 Idaho 106, 111, 190 P.3d 925, 930 (Ct. App. 2008). Only when the language of a deed is ambiguous may the parties' intent be determined from extrinsic evidence. *Firkins*, 121 Idaho at 697, 827 P.2d at 710.

The warranty deed Cridlebaugh granted to the Hochs conveyed an express easement over the upper road. In conveying the parcels to the Sweets and Vances, Cridlebaugh clearly reserved to himself easements over all roadways existing on the properties. Both deeds specifically reserved to the grantor "an easement over and across all roadways presently existing on the property herein being conveyed." Cridlebaugh testified that the upper road existed on the property when he purchased it in 1999 and remained in existence when the property was later conveyed. As such, the upper road was included in the easement reservation made in the deeds to the Vances and Sweets. The easement over the upper road is

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one that runs with the land since it was created for the benefit of Cridlebaugh's remaining property. Cridlebaugh reserved the easement so he could have access to the remaining 30 acres of his property – the 10 acres he kept for himself and the 20 acres he subsequently conveyed to the Hochs. Because the reserved easement is appurtenant, it was included in the conveyance of the 20 acre parcel to the Hochs. It was not even necessary that the easement be specifically mentioned in the Hochs' deed. The fact that the easement was included in the deed, however, further supports the conclusion that the Hochs have an easement over the upper road.

The neighbors' position that Cridlebaugh did not convey an easement over the upper road to the Hochs is unpersuasive. The Hochs' deed specifically indicates that, in addition to the property being conveyed, Cridlebaugh was conveying an appurtenant "[e]asement for the purpose of ingress and egress and rights incidental thereto as reserved in [the deeds to the Vances and Sweets]." Those deeds reserved easements over all existing roadways, including the upper road. As such, the language of the deed makes clear that the Hochs acquired an easement over the upper road when they purchased their property from Cridlebaugh. Because the language of the deed is unambiguous in this regard, parol evidence may not be used to contradict the terms of the conveyance. Any subsequent assertions by Cridlebaugh that he did not intend to grant the Hochs an easement over the upper road are therefore irrelevant and inadmissible.

2. In the event the Court concludes the Hochs were not granted an express easement, the Hochs have an easement implied by necessity over the upper road.

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PLAINTIFFS' REPLY TO DEFENDANTS' SWEETS' REPLY MEMORANDUM

Idaho law recognizes two categories of implied easements: easements implied by necessity and easements implied from prior use. *Backman v. Lawrence*, 147 Idaho 390, 394, 210 P.3d 75, 79 (2009); *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). Easements are implied by reason of necessity "because the parties at the time of severance presumably recognized the need for access" and the conveyance of property must include "whatever is necessary for the beneficial use of that property." *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct. App. 1987). Three elements must be satisfied to "establish an easement by necessity: (1) unity of ownership prior to division of a tract; (2) necessity for an easement at the time of severance; and (3) great present necessity."[4] *Id.* Whether an easement by necessity exists depends upon the totality of the circumstances. *Id.* Once the three elements are satisfied, an easement by necessity will be held to exist, regardless of any contrary intent held by one of the parties. *Id.* at 1119, 739 P.2d at 418. The easement will continue as long as the necessity exists unless the easement is terminated by express agreement. *Id.* An easement by necessity will not be recognized where the benefits of the easement are

[4] This last element has been reformulated to require only reasonable necessity, however, courts still use the term "great necessity" in describing the required elements. *See Backman*, 147 Idaho at 394, 210 P.3d at 79; *MacCaskill*, 112 Idaho at 1120 n.3, 739 P.2d at 419 n.3. *But see Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 605, 130 P.3d 1138, 1143 (2006) (noting that to establish reasonable necessity in the context of easements implied from prior use, a claimant's burden is less than that required to show great present necessity in the context of easements implied by necessity). Idaho case law has not seemed to recognize or address the contradicting characterizations. The distinction likely lies, however, in whether the implied easement will benefit the grantor or the grantee. *See, e.g., Schmidt v. Eger*, 289 N.W.2d 851, 854 (Mich. Ct. App. 1980) ("It appears to be the position of a majority of jurisdictions that an implied grant of an easement requires only a showing of reasonable necessity, while an implied reservation of an easement in the grantor requires a showing of strict necessity."). Regardless of which standard the court chooses to apply, however, for the reasons discussed below, the Hochs have met their burden of proving necessity.

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outweighed by the damage or inconvenience that may result to the owner of the servient estate. *Id.* at 1120, 739 P.2d at 419.

To satisfy the necessity element of an easement implied by necessity, the plaintiff need only show there is a reasonable necessity for the easement. *MacCaskill*, 112 Idaho at 1120 n.3, 739 P.2d at 419 n.3. Reasonable necessity does not require that existing routes be "absolutely impossible to use," however, it is not enough to show that the existing route is simply inconvenient or expensive. *Id.* at 1120, 739 P.2d at 419; *Weaver*, 106 Idaho at 542, 681 P.2d at 1017. Accordingly, reasonable necessity does not exist where access can be made practical at a reasonable expense. *MacCaskill*, 112 Idaho at 1120, 739 P.2d at 419. Where "the difficulty or expense of using the legally available route is so great that it renders the parcel unfit for its reasonably anticipated use," the reasonable necessity element will be satisfied. *Id.*

Necessity for an easement may exist based on either physical or legal obstacles. *Id.* Thus, "topographical characteristics of the land [that] make the legal access impassable" may justify an easement by necessity. *Id.*; *see also* 11 AM. JUR. *Proof of Facts* 3d 601 (2009). Examples of topographical obstacles include mountainous, rocky areas, steep canyons, cliffs, flooding rivers, and low wetlands. 11 AM. JUR. *Proof of Facts* 3d 601 (2009); *MacCaskill*, 112 Idaho at 1119-20, 739 P.2d at 418-19 (recognizing an easement by necessity may exist where access to one portion of property is adequate but another portion of the property is isolated by topographical features). Topographical barriers may justify an easement by necessity even when the barriers are only seasonal. *See Liles v. Wedding*, 733 P.2d 952, 953-54 (Or. Ct. App. 1987) (concluding easement by

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necessity had been established when claimants alternative means of access was untraversable half of the time because of flooding); *Berge v. State*, 915 A.2d 189, 192 (Vt. 2006) (concluding easement implied by necessity existed over road when the plaintiff would otherwise be left without consistent practical means of accessing the property because other access did not exist during the winter); *Bochi v. Shaffer*, 1999 WL 33438818, *2-3 (Mich. Ct. App. 1999) (recognizing an easement implied by necessity may exist during the periods when the primary access road is impassable) (unreported); *cf. Cordwell v. Smith*, 105 Idaho 71, 82, 665 P.2d 1081, 1092 (Ct. App. 1983) (holding no easement by necessity existed where claimed easement access and alternative access were both unavailable during the winter months).

In the event the court concludes the Hochs did not obtain an express easement, they have an easement over the upper road based on the theory of easement implied by necessity. First, there was unity of ownership of the dominant estate (now owned by the Hochs) and the servient estates (now owned by the Sweets, Vances, and Cridlebaugh). Each parcel was owned by Cridlebaugh prior to the subdivision of the 90 acre tract. Second, there was a necessity for the easement at the time of severance because, without the easement, the Hochs property was inaccessible during the winter months and only accessible by four wheel drive vehicle at other times. Third, topographical features make an easement over the upper road reasonably necessary. Due to the terrain and heavy snow that accumulates during the winter months, alternative access to the Hochs' property is unavailable during the winter. At such times, the Hochs' only access to their

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property is through use of the upper road. Accordingly, an easement over the upper road is necessary for the Hochs to put their property to practical use as their family residence.[5]

2. The Hochs have an easement implied from prior use over the upper road.

An easement implied from prior use exists when the plaintiff establishes there was: (1) "unity of title and subsequent separation by grant of the dominant estate"; (2) apparent and continuous use of the easement for "long enough before separation of the dominant estate to show the use was intended to be permanent"; and (3) the easement is "reasonably necessary to the proper enjoyment of the dominant estate." *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 605, 130 P.3d 1138, 1143 (2006); *Akers v. Mortensen*, 147 Idaho 39, 45, 205 P.3d 1175, 1181 (2009); *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). In determining whether there is reasonable necessity, courts focus on whether access was necessary at the time of severance rather than present necessity. *Harrison*, 142 Idaho at 605, 130 P.3d at 1143. Thus, unlike easements implied by necessity, easements implied from prior use are not extinguished once access is no longer reasonably necessary. *Id.*

The Hochs have an easement implied by prior use over the upper road. As discussed above, there was unity of title of the dominant and servient estates before severance and the easement was reasonably necessary at the time of severance. Thus, the first and third elements required to establish an easement implied from prior use are satisfied. The final element, apparent and continuous use, is also present. Cridlebaugh testified that the upper road has existed on the property since he purchased the 90 acres in

[5] Should the court conclude access to the upper road is only necessary during the winter, an easement implied by necessity exists on a seasonal basis. *See, e.g., Bochi v. Shaffer*, 1999 WL 33438818, *2-3 (Mich. Ct. App. 1999).

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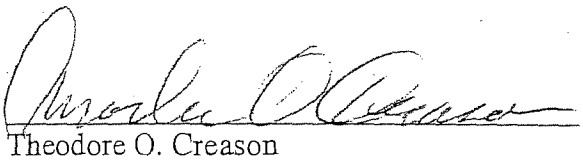
1999 and that he used the road to access the Hoch property during his period of ownership. By continuing to use the road and reserving an easement over the road in the grants to the Sweets and Vances, it is evident Cridlebaugh intended the easement to be permanent. Because there is evidence supporting each of the three elements necessary to prove an easement implied from prior use, the Hochs also have an easement over the upper road based on that theory.

IV. CONCLUSION

The Hochs have an easement over the upper road based on each of the following theories: the grant of an express easement, an easement implied by necessity, and an easement implied from prior use. As such, summary judgment should be entered in their favor and their request for an injunction preventing the neighbors from interfering with the easement should be granted.

DATED this 20th day of October, 2009.

CREASON, MOORE & DOKKEN, PLLC



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I HEREBY CERTIFY that on this 20th day of October, 2009, a copy of the foregoing MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT was served by the method indicated below and addressed to the following:

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, Husband and wife, Plaintiff, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendant.	CASE NO. CV08-02272 **VERIFIED COMPLAINT TO ENJOIN DEFENDANTS FROM OBSTRUCTING EASEMENT**

COME NOW JOHN M. HOCH and CAROLE D. HOCH, husband and wife, and for cause of action against the defendants, JAKE SWEET and AUDREY SWEET, husband and wife, and ROB VANCE and BECKY VANCE, husband and wife, and allege as follows:

Case Assigned to:
CARL B. KERRICK

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I.

Plaintiffs are the owners of a tract of land located in Nez Perce County, State of Idaho, that adjoins defendant Vance's property to the west and defendant Sweet's property to the north, more particularly described as follows:

> The West half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official records of Nez Perce County, Idaho.

II.

Defendants ROB VANCE and BECKY VANCE, husband and wife, are the owners of a tract of land located in Nez Perce County, State of Idaho, that adjoins plaintiffs' property to the east, more particularly described as follows:

> The East Half of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

III.

Defendants JAKE SWEET and AUDREY SWEET, husband and wife, are the owners of a tract of land located in Nez Perce County, State of Idaho, that adjoins plaintiffs' property to the south, more particularly described as follows:

> The Southwest Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

IV.

Prior to October 12, 2000, all three of the above described properties were owned by JACK W. CRIDLEBAUGH, the plaintiffs and defendants common grantor.

V.

On October 12, 2000, said JACK W. CRIDLEBAUGH conveyed to the defendants Vance the land described in paragraph II above by Warranty Deed recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho. A copy of said Warranty Deed is attached hereto as Exhibit "A" and incorporated herein by reference.

VI.

The Warranty Deed from Cridlebaugh to the defendants Vance reserved, in favor of Cridlebaugh, his heirs and assigns, certain easements for ingress and egress, including the following:

> "TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.
>
> RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed."

VII.

On October 10, 2001, said JACK W. CRIDLEBAUGH conveyed to the defendants Sweet the land described in paragraph III above by Warranty Deed recorded October 10, 2001 as

Instrument No. 668025, records of Nez Perce County, Idaho. A copy of said Warranty Deed is attached hereto as Exhibit "B" and incorporated herein by reference.

VIII.

The Warranty Deed from Cridlebaugh to the defendants Sweet reserved, in favor of Cridlebaugh, his heirs and assigns, certain easements for ingress and egress, including the following:

> "TOGETHER WITH AND SUBJECT TO an easement for ingress and egress over and across existing roads located on the following described property: The East half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter, all located in Section 22, Township 33 North, Range 4 West of the Boise Meridian, the Grantor reserving for himself, his heirs and assigns, said easements."
>
> RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described property which are an appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed."

IX.

On March 26, 2002, said JACK CRIDLEBAUGH conveyed to the plaintiffs the real property described in paragraph I above by Warranty Deed recorded March 26, 2002 as Instrument No. 673441, records of Nez Perce County, Idaho. A copy of said Warranty Deed is attached hereto as Exhibit "C" and incorporated herein by reference. Said Warranty Deed provided, in part, as follows:

> "SUBJECT TO AND TOGETHER WITH the rights and responsibilities set forth in the following easements:
>
> ...

5. Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho.

(The deed conveying the property to the defendants Vance.)

6. Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho."

(The deed conveying the property to the defendants Sweet.)

X.

On November 17, 2007, the defendants Sweet mailed to the plaintiffs a letter stating that any easement across their property would be terminated at the latest on June 30, 2008. A copy of said letter is attached hereto as Exhibit "D" and incorporated herein by reference.

XI.

In furtherance of their threat to terminate ingress and egress easement which the plaintiffs enjoy over the property owned by defendants Sweet, on at least three occasions since June 30, 2008, the defendants Sweet have blocked access to plaintiffs' property. Most recently, the blockage was over the weekend of July 12 and 13, 2008 and on July 16, 2008 when the defendants placed a tractor in the middle of the easement. A photograph depicting the blocking of the easement is attached hereto as Exhibit "E" and incorporated herein by reference.

XII.

Since the blockage of the Plaintiff's access to their property by the defendants Sweet in July of 2008, the Defendant's Vance have caused a survey to be completed of their property. The preliminary results of said survey, which is not as the date of the filing of this complaint been filed for record in Nez Perce County, Idaho, indicate that the north-south boundary line dividing the Plaintiff's property from the Defendants Vance's property has shifted from the location as originally understood by the parties, to the West. As a result thereof, the Defendants Vance have taken the position that a portion of the Plaintiff's access road actually lies on their property. The Defendants Vance have removed the impediments theretofore placed on said access road by the Defendants Sweet, and have placed an earthen obstacle on said road thereby again cutting Plaintiff access to their property.

XIII.

Without the use of such access granted to the plaintiffs by Jack Cridlebaugh, the plaintiffs will not be able to complete the construction of their home on the premises, or after construction of the home have reasonable year round access to their property.

XIV.

Unless the defendants Sweet and Vance are restrained from blocking the easement, the plaintiffs will be without reasonable year around access to their property. The plaintiffs will suffer damages which are impossible to assess at the present time. Plaintiffs have no adequate remedy at law and are restricted to this application for injunctive relief.

WHEREFORE, plaintiffs request:

1. That the Court permanently enjoin and restrain the defendants, JAKE SWEET and AUDREY SWEET, husband and wife, from blocking the easement across defendants' Sweet real property to the plaintiffs' real property.

2. That the Court permanently enjoin and restrain the defendants, ROB VANCE and BECKY VANCE, husband and wife, from blocking the easement across defendants' Vance real property to the plaintiff's real property.

3. That the plaintiffs be awarded reasonable attorney's fees incurred by plaintiff in the prosecution of this action for the common benefit of the parties hereto pursuant to Idaho Code §12-121.

4. Granting plaintiffs any other relief, in law or in equity, to which it deems plaintiff to be entitled.

5. For costs of suit as prescribed by law;

6. For such further relief as the Court may deem just and equitable.

DATED this 21st day of October, 2008.

JONES, BROWER & CALLERY, P.L.L.C.

GARRY W. JONES / THOMAS W. CALLERY
Attorneys for Plaintiffs

STATE OF IDAHO)
: ss.
County of Nez Perce)

JOHN M. HOCH and CAROLE D. HOCH, being first duly sworn, upon oath deposes and states:

We are the plaintiffs named herein; we have read the foregoing VERIFIED COMPLAINT TO ENJOIN DEFENDANTS FROM OBSTRUCTING EASEMENT, know the contents thereof, and that the allegations therein made are true as I verily believe.

JOHN M. HOCH

CAROLE D. HOCH

SUBSCRIBED AND SWORN to before me this 20th day of October, 2008.

GARRY W. JONES NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho,
Residing at Lewiston therein.

My commission expires 5-22-2010

MICROFILM NO.
657867

INDEXED
FILMED
DELIVERED ( )
MAILED ( )

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto ROB VANCE and BECKY VANCE, husband and wife, the Grantees, whose current address is 14400-130th Avenue N.E., Kirkland, Washington 98034, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian.

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

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EXHIBIT

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SUBJECT TO an easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2000 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this ___ day of October, 2000.

GRANTOR:

Jack W. Cridlebaugh

JACK W. CRIDLEBAUGH

INST. NO 1257867
FILED FOR RECORD
FEE 12.00 PTG. BY ALLIANCE TITL
2000 OCT 16 A 10:30
PATTY O. WEEKS
RECORDER NEZ PERCE CO ID
BY Carrie DEPUTY

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EXHIBIT
tabbies
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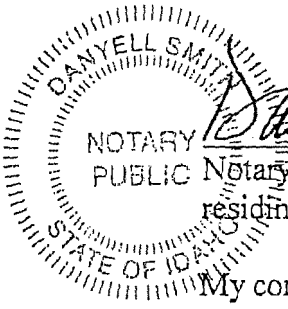
STATE OF IDAHO)
: ss
County of Nez Perce)

On this 12th day of October, 2000, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.



Danyell Smith
Notary Public in and for the State of Idaho,
residing at Lewiston.
My commission expires 01-12-2004

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EXHIBIT
tabbies
A

RECORDED

MICROFILM

668025

INDEXED
FILMED
DELIVERED
MAILED

aa.s.

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto JAKE SWEET and AUDREY SWEET, husband and wife, the Grantees, whose current address is 1516-8th St Clarkston WA 99403, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, including but not limited to the easements set forth in that certain Quitclaim Deed by and between MIKE T. McHARGUE, an unmarried man, as Grantor, and APC Co., as Grantee, recorded September 4, 1987 under Instrument No. 514248, records of Nez Perce County, Idaho, and that certain Warranty Deed by and between EVERETT CASSELL, also known as EVERETT J. CASSELL and BERYL A. CASSELL, husband and wife, as Grantors, and MICHAEL T. McHARGUE and MARY C. McHARGUE, husband and wife, as Grantee, recorded April 3, 1986 under Instrument No. 497394, records of Nez Perce County, Idaho, and that certain Easement by and between John Carpenter and Delia Carpenter, husband and wife, parties of the first part, and EVERETT J. CASSELL and BERYL A. CASSELL, husband and wife, parties of the second part, recorded under Instrument No. 401230, records of Nez Perce County, Idaho, and that certain Quitclaim Deed by and between PAUL N. WEINERT and GRACE WEINERT, husband and wife, to MIKE T. McHARGUE, a single man, recorded under Instrument No. 478091, records of Nez Perce County, Idaho.

TOGETHER WITH AND SUBJECT TO an easement for ingress and egress over and across existing roads located on the following described property: The East Half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter all located in Section 22, Township 33 North, Range 4 West of the Boise Meridian, the Grantor reserving for himself, his heirs and assigns, said easements.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

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EXHIBIT
tabbies
B

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the

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owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

SUBJECT TO an easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2001 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

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IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this 10th day of October, 2001.

GRANTOR: Jack W. Cridlebaugh
JACK W. CRIDLEBAUGH

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 10th day of October, 2001, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

DANYELL SMITH NOTARY PUBLIC STATE OF IDAHO

Danyell Smith
Notary Public in and for the State of Idaho,
residing at Clarkston.
My commission expires 01-12-2004

INST. NO. 668025
FILED FOR RECORD
FEE 12.00 REG. BY ALLIANCE TITLE
2001 OCT 10 P 3:08
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Lucia DEPUTY

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EXHIBIT
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9000202053E

673441

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto JOHN M. HOCH and CAROLE D. HOCH, husband and wife, the Grantees, whose current address is 903 PROSPECT, LEWISTON, ID, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The West Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, official Records of Nez Perce County, Idaho.

SUBJECT TO AND TOGETHER WITH the rights and responsibilities set forth in the following easements:

1) Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

2) Easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

3) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

4) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

5) Easement for the purpose of ingress and egress and rights incidental thereto as set forth in a document recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho.

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6) Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

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H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2002 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this 26th day of March, 2002.

GRANTOR:

Jack W. Cridlebaugh
JACK W. CRIDLEBAUGH

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tabbies
C

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 26th day of March, 2002, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

GARY W. JONES NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho,
residing at LEWISTON.

My commission expires 5-22-2004

INST. NO 073441
FILED FOR RECORD
FEE 12.00 REG. BY ALLIANCE TITLE
2002 MAR 26 P 4:32
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Cindy Ard DEPUTY

PLAINTIFFS' REPLY TO DEFENDANTS' SWEETS' REPLY MEMORANDUM

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November 17, 2007

John and Carol

As friends and neighbors we are excited and happy for you that it appears construction of your new home is coming to completion. You certainly must be thrilled to see the building of your dream home coming into the final stages of assembly, as you approach the day that you too, get to move in and start enjoying the peace, quiet, seclusion, and enjoyment of country living here on the mountain.

With winter quickly approaching and the beauty of the changing season, Audrey and I were reflecting back on how much we have enjoyed our past several years living here. Probable like yourselves, our dream has always been to live away from all the hustle-bustle of city living, and enjoy a slower pace of peaceful, quiet, semi-seclusion, without all the noise, interruptions, and traffic associated with city living. So, with those thoughts still fresh in our minds, we wanted to again revisit the subject and previous conversations we have had regarding your use of our road. As you recall, during our initial discussions on this matter we granted you permission for construction access across our road and property to assist you and your contractors in having ready made access to your construction site. I think you would have to agree, that this construction access across our road and property has been most helpful in assisting you in a much timelier and substantially less costly approach to the construction of your new home! As neighbors we were happy to assist you in this way, as we too know that at this elevation you have a considerably shorter construction window than down in town.

While it appears that the majority of the construction of your new house is nearing completion, we know you still have some work that will likely be continuing over the next few months. As winter is quickly approaching and ground freeze and snow are already making a showing of the transition into winter, we have decided for the time

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tabbies

being, to make no immediate changes to our previous permission for you to gain construction access to your home by entering and exiting it across our road and property. As always, we expect you and your contractors to treat the road with respect, maintain a slow and reasonable speed, watch for our grandchildren and dogs at play, and promptly assist with maintenance and repairs as needed and appropriate.

As I stated above, Audrey and my dream has always been to live away from all the hustle-bustle of city living, and enjoy a slower pace of peaceful, quiet, semi-seclusion, without all the noise, interruptions, and traffic associated with city life. Obviously, it is no surprise to either of us that this has not been the case since we granted you construction access for the building of your new house. To put it frankly, the traffic, not knowing who is coming and going, dust, dogs always barking at passing cars, and vehicles driving so close to our home is much more disturbing than we had ever anticipated; however, it is something that we have agreed to handle for a while longer and is truly the neighborly thing to do.

As your major construction will be coming to an end in the next month or so, we will be into the snowy freezing months of winter when outside work is almost impossible. Therefore, we don't feel it reasonable at this time to ask you to start building or using an alternate access route to your home, rather than the construction route you have been using across our road and property. However, you need to start planning now on upgrading your initial and legal access road to your home, such that any required construction or upgrade work on it can commence as soon as spring weather allows. Even with a late spring, there is no reason for you to not have your own access road to your new home completed by the end of June 2008. This gives you eight months to plan and obtain any needed permissions, permits, contractors, materials, or any other items that may be needed for the timely completion of your own road. Therefore, Audrey and I have agreed that your construction access to your home across our road and property will terminate as soon as your road is completed, and under no circumstances later than June 30, 2008.

We feel as neighbors we have been very fair and patient in providing you construction access; however, as you know, it was never intended to be anything more than temporary for the purposes of construction. The removal of all outside traffic going across our place allows us both to get on with our lives and pursue our priorities. Having your own access road to your home allows you to monitor and control the access and security of your road, property, and dwellings. For us, no longer having outside traffic across our road and property allows us to monitor and control the access and security of our road, property, and dwellings.

I hope you don't find this letter to be a surprise or harsh, as neither are our intent. We are neighbors and we feel we have been and are continuing to do the right and neighborly thing, otherwise we would have never agreed to your construction access in the beginning. We just want to communicate this to you in writing to insure you clearly understand our position and timeline on the matter of your use of our road, and for everyone's safety, security, and overall well being that your use must come to an end in the not to distant future. If you have any questions or there is any portion of this letter that you don't understand please feel free to give us a call or drop by.

Best Regards,

272

EXHIBIT

tabbies

D

PLAINTIFF
EXHIBIT
273
E
tabbies

EXHIBIT 3

MICROFILM NO.
657867

INDEXED
FILMED
DELIVERED ( )
MAILED ( )

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto ROB VANCE and BECKY VANCE, husband and wife, the Grantees, whose current address is 14400-130th Avenue N.E., Kirkland, Washington 98034, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian.

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

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EXHIBIT
tabbies
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C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

276

EXHIBIT

tabbies

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SUBJECT TO an easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2000 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this ___ day of October, 2000.

GRANTOR:

Jack W. Cridlebaugh
JACK W. CRIDLEBAUGH

INST. NO. 1578167
FILED FOR RECORD
FEE 12.00 PD. BY ALLIANCE TIT
2000 OCT 16 A 10:30
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Connie DEPUTY 277

EXHIBIT
tabbies
A

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 12th day of October, 2000, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

DANYELL SMITH NOTARY PUBLIC STATE OF IDAHO

Danyell Smith

Notary Public in and for the State of Idaho, residing at Lewiston.

My commission expires 01-13-2004

EXHIBIT 4

2000/6/40E

MICROFILMED

668025

INDEXED ( )
FILMED ( )
DELIVERED ( )
MAILED ( )

aa.s.
JRS

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto JAKE SWEET and AUDREY SWEET, husband and wife, the Grantees, whose current address is 1516-8th St Clarkston WA 99403, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, including but not limited to the easements set forth in that certain Quitclaim Deed by and between MIKE T. McHARGUE, an unmarried man, as Grantor, and APC Co., as Grantee, recorded September 4, 1987 under Instrument No. 514248, records of Nez Perce County, Idaho, and that certain Warranty Deed by and between EVERETT CASSELL, also known as EVERETT J. CASSELL and BERYL A. CASSELL, husband and wife, as Grantors, and MICHAEL T. McHARGUE and MARY C. McHARGUE, husband and wife, as Grantee, recorded April 3, 1986 under Instrument No. 497394, records of Nez Perce County, Idaho, and that certain Easement by and between John Carpenter and Delia Carpenter, husband and wife, parties of the first part, and EVERETT J. CASSELL and BERYL A. CASSELL, husband and wife, parties of the second part, recorded under Instrument No. 401230, records of Nez Perce County, Idaho, and that certain Quitclaim Deed by and between PAUL N. WEINERT and GRACE WEINERT, husband and wife, to MIKE T. McHARGUE, a single man, recorded under Instrument No. 478091, records of Nez Perce County, Idaho.

TOGETHER WITH AND SUBJECT TO an easement for ingress and egress over and across existing roads located on the following described property: The East Half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter all located in Section 22, Township 33 North, Range 4 West of the Boise Meridian, the Grantor reserving for himself, his heirs and assigns, said easements.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

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EXHIBIT
tabbies
B

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the

owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

SUBJECT TO an easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2001 and thereafter, and that he will warrant and defend the same from all lawful claims whatsoever.

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EXHIBIT

tabbies

B

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this 10th day of October, 2001.

GRANTOR: Jack W. Cridlebaugh
JACK W. CRIDLEBAUGH

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 10th day of October, 2001, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

DANYELL SMITH NOTARY PUBLIC STATE OF IDAHO

Danyell Smith
Notary Public in and for the State of Idaho,
residing at Lewiston.
My commission expires 01-12-2004

INST. NO. 668025
FILED FOR RECORD
FEE 12.00 REQ. BY ALLIANCE TITLE
2001 OCT 10 P 3:08
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
DEPUTY

EXHIBIT
tabbies
B

EXHIBIT 5

900020053E

673441

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto JOHN M. HOCH and CAROLE D. HOCH, husband and wife, the Grantees, whose current address is 903 PROSPECT, LEWISTON, ID, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The West Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, official Records of Nez Perce County, Idaho.

SUBJECT TO AND TOGETHER WITH the rights and responsibilities set forth in the following easements:

1) Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

2) Easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

3) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

4) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

5) Easement for the purpose of ingress and egress and rights incidental thereto as set forth in a document recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho.

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EXHIBIT

C

6) Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

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EXHIBIT

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C

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2002 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this 26th day of March, 2002.

GRANTOR: Jack W. Cridlebaugh

JACK W. CRIDLEBAUGH

287

EXHIBIT tabbies C

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 26th day of March, 2002, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

GARRY W. JONES NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho, residing at LEWISTON.

My commission expires 5-22-2004.

INST. NO. 073441
FILED FOR RECORD
FEE 12.00 REG. BY ALLIANCE TITLE
2002 MAR 26 P 4:32
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Cindy Cook DEPUTY

EXHIBIT
tabbies
C

FILED

2009 DEC 28 AM 9 30

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH, et al Plaintiff, vs. JAKE SWEET, et al Defendant.	CASE NO. CV 08-2272 MEMORANDUM DECISION AND ORDER

This case comes before me on the Hochs' motion for summary judgment.

CONTENTIONS

The Hochs, Vances and Sweets acknowledge an easement common to all property owners and others on what is called the lower road. This dispute is about whether or not the Hochs have an easement over what is called the upper road that traverses the Sweet parcel and crosses a corner of the Vance parcel.

The Hochs complain that the Sweets have wrongfully obstructed their access to their easement over the upper road. The Sweets and the Vances submit they are entitled to block access because the Hochs do not have an easement over the upper road. They base their submission on contention that the upper road was not a "roadway" within the contemplation of the deeds, that the deeds are ambiguous so the intentions of the parties to the conveyances are relevant to what easements were conveyed and that in any event the easement created over the upper road by the deed to the Sweets was personal to Mr. Cridlebaugh and did not run with the land.

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The Vances also argue the Hoch deed is ambiguous because the preexisting (Turner) appurtenant easements are referred to by instrument numbers in the Hoch deed but the easement over the upper road created in the Sweet deed is not referred to in the Hoch deed by instrument numbers. This, they argue, indicates an intention to treat the upper road differently, that is, not appurtenant, than the Turner easements, which are specifically described as appurtenant. The Hochs posit, in response, that their deed unambiguously and without any material factual dispute conveys an appurtenant easement over the upper road.

FACTS

Jack Cridlebaugh bought ninety acres of land at Waha in Nez Perce County. He subdivided the property into several parcels. He sold twenty acres to Rob and Becky Vance on October 12, 2000, forty acres to Jake and Audrey Sweet on October 10, 2001 and twenty acres to John and Carol Hoch on March 26, 2002. He retained ten acres for himself.

Mr. Cridlebaugh conveyed his interests in the land to the grantees by warranty deeds. The Vances deed conveyed the east half of the northeast quarter of the northwest quarter of section 22 and it included the following easement provisions:

> TOGETHER WITH all easement for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.
>
> RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

The conveyance was also made subject to preexisting easements by referring to them by their recorded instrument numbers (Turner easements). The parties agree that the Turner easements are across the lower road.

The Sweet deed conveyed the southwest quarter of the northwest quarter of section 22, together with and subject to ingress and egress easements "across existing roads located" on described portions of the northwest quarter of section 22. The parties agree this language creates an easement over the upper road. Mr. Cridlebaugh also reserved the same easements and subjected the conveyance to the same Turner easements as he had in the Vance deed.

Mr. Cridlebaugh conveyed to the Hochs "all of his interest" in the west half of the northeast quarter of the northwest quarter of section 22. The conveyance included the "rights and responsibilities in the following easements," which included the Turner easements and "(5) Easement for the purpose of ingress and egress and rights incidental thereto as set forth in a document recorded October 16, 2000 as Instrument No. 657867[Vance deed], records of Nez Perce County, Idaho, (6) Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025 [Sweet deed] records of Nez Perce County, Idaho."

The Sweets and the Vances aver when they bought their parcels that what is now referred as the upper road did not exist as a road. They conclude, therefore, that it does not come within the ambit of the "roads" and "roadways" over which Mr. Cridlebaugh created and reserved easements in their deeds.

Mr. Cridlebaugh testified that when he bought the property there were two access easements to it from Stagecoach Road, an upper one and a lower one. He

testified that the upper road was steep and rutted but that he could get a pickup across it. Once he owned the property he hired Bert Teats to blade both roads to make them passable by a pickup. He had Mr. Teats fix the roads in 1997 or 1998 so he could log the property before he sold it. He describes the upper road as follows:

> It was just a dirt road. Nobody graveled it or anything. It traveled from, well, from my property through Sweets, and originally the road made a loop before I bought it. It came up Buckboard Lane and crossed in a westerly direction in front of Vances, made a loop out toward the Hochs' property and then went right back up this way, out to my ten acres. P19 of deposition.

Jake Sweet confirms the upper road existed but that it was impassable much of the year because it went into a ravine. He later filled the ravine so it was more amenable to travel. He also says that a portion of the upper road was only passable by ATVs until he removed a large stump. Prior to the work he did or had done on it, he did not consider it a road.

Ms. Vance says the upper road ended at the Sweet house until Mr. Sweet extended it to the Hoch property.

Mr. Cridlebaugh testified that he reserved an easement over the upper road in the Sweet deed so he could access the property he eventually sold to the Hochs from the ten acres he retained. At oral argument the parties agreed that that was what he had done.

Following the conveyance to the Hochs in 2002 they began building a house on their parcel. With the consent of the Vances, they used the upper road to facilitate the construction logistics. In November of 2007, the Vances notified the Hochs that "access to your home across our road and property will terminate a soon as your road

is completed, and under no circumstances later than June 30, 2008." Since then the Vances have obstructed access to the Hochs home by way of the upper road. This action followed.

DISCUSSION

Summary resolution of this dispute is only available in the absence of any material factual issue. *Wick v. Eismann,* 122 Idaho 698 (1992). The first inquiry, therefore, is whether the deed to the Hochs is ambiguous. If it is ambiguous a factual inquiry will be necessary to determine the material issue of what the parties intended.

The Sweets and the Vances argue that the grantor's reservation clause provides that only the Turner easements that existed over the lower road when the property was conveyed are appurtenant and the newly created easements "over and across all roadways presently existing on the property" are personal to Mr. Cridlebaugh and do not run with the land because he did not describe them as appurtenant. They conclude that the deeds are therefore ambiguous.

The text of a document is ambiguous if it is susceptible to two reasonable but conflicting interpretations. *Read v. Harvey*, 141 Idaho 497, 499 (2005); *Latham v. Garner,* 105 Idaho 854, 858 (1983). Whether or not there are reasonable but conflicting interpretations must be viewed in the context of all the documents in which the questioned language is found and from that language which the documents have been incorporated by reference. See, *Neider v. Shaw*, 138 Idaho 503, 508 (2003) ("The intent of the parties is determined by viewing the conveyance instrument as a whole.").

It is important in real property transactions for all parties to be able to rely on the written documents without having to guess what was intended. Deeds and agreements

are written for the laudable aim of avoiding confusion and having to guess about what was intended. *Cannon v. Perry*, 141 Idaho 728, 731 (2007). When construing the deeds and the nature of the easements, I am obliged to examine the language and the circumstances leading up to and involving the conveyances. *Read*, 141 Idaho at 500; *Burns v. Alderman*, 122 Idaho 749, 753 (Ct. App. 1992); R. Cunningham, W. Stoebuck & D. Whitman, Property § 8.1, 8.16, 8.25 (1984); Conrad, Words Which Will Create an Easement, 6 Mo. L. Rev. 245 (1941).

The documents are deeds conveying multiple parcels from a single piece of land. The Vance deed grants "all easements for ingress and egress" to the Vances and reserves to the grantor, "his heirs and assigns, all easements for ingress and egress" and grants new easements "across all roadways presently existing." The circumstances surrounding these real property transactions make it obvious that Mr. Cridlebaugh is ensuring access over the property he has sold to the property he has yet to sell or which he may decide to keep.

The Sweet deed conveyed the forty acres that lie between the ten acres Mr. Cridlebaugh eventually decided to keep and the twenty acre Hoch property, which at that time he still owned. The parties agree and the deed reflects that Mr. Cridlebaugh created a specific easement over the upper road across the Sweet property that was necessary to gain access from his ten acres to the twenty acres the Hoch would buy the next year. That conclusion is confirmed by the deed's recitation that the purpose of subjecting the Sweet property to the easement is for "ingress and egress."

Mr. Cridlebaugh then reserved to himself, "his heirs and assigns, all easements for ingress and egress... which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein

being conveyed."

In summary, Mr. Cridlebaugh created an access easement over the upper road from his ten acres to the twenty acres the Hochs later bought. He then reserved to himself, his heirs and assigns all existing easements of which that was one. I conclude that the upper road easement Mr. Cridlebaugh created and reserved for himself and his heirs and assigns was conveyed to the Hochs by paragraph (6) where he conveyed the ingress and egress easement that he had reserved in the Sweet deed.

I find nothing ambiguous about that language. An access easement between two separate pieces of property is created by the grantor over the property being sold, the grantor then reserves that easement to himself so he can use it and then he later conveys it by reference to the people who bought the parcel for which the easement had been created to provide access. This is about us straight forward as straight forward gets.

It is also noteworthy that if Mr. Cridlebaugh had wanted to exempt the upper road easement from his deed to the Hochs he could and should have said so because the Hochs were entitled to rely on what their deed said. Mr. Cridlebaugh not only did not exempt the upper road easement in the Sweet deed from the Hoch deed, he specifically conveyed "all of his interest in the" described property. The grant to the Hochs is "TO HAVE AND TO HOLD the said premises unto said Grantees, their heirs and assigns forever." Here, as was the case in *R.C.R. Inc.*, the deed "contains no limitations on the transferability of the easement and, in fact, contemplates future transfers of both the dominant and servient estates." 978 P2d at 586-587.

The Vances argue, nonetheless, that because the Turner easements were described as appurtenant and referred to by instrument number and the upper road

easement was not so described and not referred to by instrument numbers that the upper road easement is in gross.

I am unpersuaded. An appurtenant easement does not depend on some talismanic phrase for its creation. *Tower Asset. Sub. Inc. v. Lawrence*, 143 Idaho 710, 714 (2007). It is created by language that imposes a servitude on a land over which the easement runs for the purpose enhancing the utility of the land to which goes. "An easement is appurtenant to land when the easement is created to benefit and does benefit the possessor of the land in his use of the land." *Weber v. Johnston Fuel Lines, Inc.,* 519 P²d 972, 975 (Wyo. 1974)). It cannot be gainsaid that access to one's property enhances one's ability to use it.

Ambiguity is not created by how one incorporates other documents by reference but rather by what the language itself says. Even if that were a possible interpretation, it would not be a reasonable one in light of the presumption against easements in gross when the language and the nature of the easement lend themselves to an appurtenant construction. *Nelson v. Johnson*, 106 Idaho 385, 387-388 (1984) ("In cases of doubt, the weight of authority holds that the easement should be presumed appurtenant."); *Todd v. Nobach*, 118 NW 2d 402, 405 (Mich. 1962); *Lynn v. Turpin,* 215 8a2d 794, 795-796 (Tenn. 1948).

Finally the parties argue the deeds are ambiguous because there is a dispute about what the terms "roads" and "roadways" mean in the Sweet deed where Mr. Cridlebaugh created an easement on "existing roads" over the Sweet property to the twenty acres that Hochs later bought and the easements he reserved "over and across all roadways presently existing" in the reservation clause.

I find that there is an issue of fact regarding what the parties viewed as a road;

that is, whether it had to be passable for a pickup to qualify as a road. There is, however, no material issue of fact that Mr. Cridlebaugh reserved as easement over what was referred to by the parties as the upper road. As a result it is not necessary to determine what Mr. Cridlebaugh meant by phrase, "together with an easement over and across all roadways presently existing on the property herein being conveyed" in the grantor's reservation clause in the Vance and Sweet deeds, since an appurtenant easement over what was called the upper road, whether or not it was understood to be an actual road or an ATV trail, had already been created in the Sweet deed and conveyed by reference in the Hoch deed.

I conclude the deeds are not ambiguous and there is no material issue of fact to be resolved and the deeds must therefore be enforced as they unambiguously read. I understand that this result may not be what Mr. Cridlebaugh intended or what the Sweets and Vances expected. But I do not reach their intentions because the Hochs were entitled to rely on what they were conveyed in the deed they received.

ORDER

For the reasons stated the Hochs' motion for summary Judgment is GRANTED as to the existence of an appurtenant easement on the upper road. This order does not address to the precise route or scope of the easement.

It is so ordered this 22 day of December 2009.

BY: John Bradbury
JOHN BRADBURY
District Judge

Mailing Certificate

I, the undersigned Deputy Clerk, do hereby certify that I mailed or delivered a copy of the foregoing document to the following persons on 12/28/09:

Jeremy Carr
Attorney at Law
P.O. Drawer 285
Lewiston, ID 83501

Edwin Litteneker
Attorney at Law
PO Box 321
Lewiston, ID 83501

Cindy Moser
Attorney at Law
PO Drawer 835
Lewiston, ID 83501

CLERK OF THE COURT

BY: _____
Deputy Clerk

Theodore O. Creason, ISB # 1563
Cynthia L. Mosher, ISB # 7988
CREASON, MOORE, DOKKEN & GEIDL, PLLC
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
(208) 743-1516
Fax: (208) 746-2231

FILED
2010 JUN 18 AM 9 15
PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife,

Plaintiffs,

vs.

JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife,

Defendants.

Case No. CV08-2272

ORDER GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT

The Plaintiffs' Motion to Amend Complaint having come before the Court telephonically on June 10, 2010, at 10:30 a.m., the plaintiffs were represented by one of their attorneys, Cynthia L. Mosher of Creason, Moore, Dokken & Geidl, PLLC, the defendants Sweet were represented by their attorney, Edwin L. Litteneker, and defendants Vance were represented by their attorney, W. Jeremy Carr of Clark and Feeney, and the Court having been fully advised in the premises, hereby makes the following order:

IT IS HEREBY ORDERED that plaintiffs are granted leave to amend their complaint as shown by the proposed Amended Complaint attached to Plaintiffs' Motion to Amend Complaint dated May 3, 2010.

DATED this 17 day of June, 2010.

JOHN BRADBURY, DISTRICT JUDGE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of June, 2010, a copy of the foregoing ORDER GRANTING PLAINTIFFS' MOTION TO AMEND COMPLAINT was served by the method indicated below and addressed to the following:

Theodore O. Creason Cynthia L. Mosher Creason, Moore, Dokken & Geidl, PLLC 1219 Idaho Street Lewiston, ID 83501	✓ ____ ____ ____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION
Edwin L. Litteneker Attorney at Law 322 Main Street Lewiston, ID 83501	✓ ____ ____ ____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION
W. Jeremy Carr Clark and Feeney 1229 Main Street Lewiston, ID 83501	✓ ____ ____ ____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION

CLERK, DISTRICT COURT

By Kathy Johnson
Deputy

Theodore O. Creason, ISB # 1563
Cynthia L. Mosher, ISB # 7988
CREASON, MOORE, DOKKEN & GEIDL, PLLC
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
(208) 743-1516
Fax: (208) 746-2231

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	Case No. CV08-2272 **PLAINTIFFS' AMENDED COMPLAINT**

COMES NOW the plaintiffs, John M. Hoch and Carole D. Hoch, husband and wife, by and through their counsel of record, Theodore O. Creason, of Creason, Moore, Dokken, & Geidl, PLLC, and for cause of action against the defendants, allege and complain as follows:

FACTUAL ALLEGATIONS

1. Plaintiffs are the owners of a tract of land located in Nez Perce County, State of Idaho that adjoins defendant Vance's property to the west and defendant Sweet's property to the north, more particularly described as follows:

The West half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official records of Nez Perce County, Idaho.

2. Defendants ROB VANCE and BECKY VANCE, husband and wife, are the owners of a tract of land located in Nez Perce County, State of Idaho that adjoins plaintiffs' property to the east, more particularly described as follows:

The East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian.

3. Defendants JAKE SWEET and AUDREY SWEET, husband and wife, are the owners of a tract of land located in Nez Perce County, State of Idaho that adjoins plaintiffs' property to the south, more particularly described as follows:

The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

4. Prior to October 12, 2000, all three of the above described properties were owned by JACK W. CRIDLEBAUGH, the plaintiffs' and defendants' common grantor.

5. On October 12, 2000, Cridlebaugh conveyed to the defendants Vance the land described in paragraph 2 above by Warranty Deed recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho. A copy of said Warranty Deed is attached hereto as Exhibit "A" and incorporated herein by reference.

6. The Warranty Deed from Cridlebaugh to the defendants Vance (hereinafter Vance Deed) reserved, in favor of Cridlebaugh, his heirs and assigns, certain easements for ingress and egress, including the following:

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

7. The Vance Deed also included several restrictive covenants, including the following:

No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

Each parcel shall be kept in a clean and attractive manner.

Exhibit A, p. 2.

8. As a remedy for violation of the covenants, the Vance Deed provides that "[e]ither Grantor or Grantees may enforce the restrictions and conditions set forth above." Exhibit A, p. 2.

9. On October 10, 2001, Cridlebaugh conveyed to the defendants Sweet the land described in paragraph 3 above by Warranty Deed recorded October 10, 2001, as Instrument No. 668025, records of Nez Perce County, Idaho. A copy of said Warranty Deed is attached hereto as Exhibit "B" and incorporated herein by reference.

10. The Warranty Deed from Cridlebaugh to the defendants Sweet (hereinafter Sweet Deed) reserved, in favor of Cridlebaugh, his heirs and assigns, certain easements for ingress and egress, including the following:

TOGETHER WITH AND SUBJECT TO an easement for ingress and egress over and across existing roads located on the following described property: The East half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter

of the Northeast Quarter all located in Section 22, Township 33 North, Range 4 West of the Boise Meridian, the Grantor reserving for himself, his heirs and assigns, said easements.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

11. The Sweet Deed also included several restrictive covenants, including the following:

No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

Each parcel shall be kept in a clean and attractive manner.

Exhibit B, p. 2.

12. As a remedy for violation of the covenants, the Sweet Deed provides that "[e]ither Grantor or Grantees may enforce the restrictions and conditions set forth above." Exhibit B, p. 3.

13. On March 26, 2002, Cridlebaugh conveyed to the plaintiffs the real property described in paragraph 1 above by Warranty Deed recorded March 26, 2002 as Instrument No. 673441, records of Nez Perce County, Idaho. A copy of said Warranty Deed is attached hereto as Exhibit "C" and incorporated herein by reference. Said Warranty Deed conveyed the property as follows:

SUBJECT TO AND TOGETHER WITH the rights and responsibilities set forth in the following easements:

...

5) Easement for the purpose of ingress and egress and rights incidental thereto as set forth in a document recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho [Vance Deed].

6) Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho [Sweet Deed].

14. The Warranty Deed Cridlebaugh conveyed to the Hochs (hereinafter Hoch Deed) also contained the following restrictive covenants:

> No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.
>
> Each parcel shall be kept in a clean and attractive manner.

Exhibit C, p. 2.

15. As a remedy for violation of the covenants, the Hoch Deed provides that "[e]ither Grantor or Grantees may enforce the restrictions and conditions set forth above." Exhibit C, p. 3.

16. On November 17, 2007, the defendants Sweet mailed the plaintiffs a letter stating that any easement across their property would be terminated at the latest on June 30, 2008. A copy of said letter is attached hereto as Exhibit "D" and incorporated herein by reference.

17. In furtherance of their threat to terminate the ingress and egress easement which the plaintiffs enjoy over the property owned by the defendants, on several occasions since June 30, 2008, the defendants have blocked access to plaintiffs' property. The most recent blockage was discovered on February 11, 2010, after the defendants placed a snow bank across the roadway. A photograph depicting a prior blocking of the easement through the use of a tractor is attached hereto as Exhibit "E" and incorporated herein by reference.

18. On December 28, 2009, the Court issued a Memorandum Decision and Order acknowledging the plaintiffs are the owners of a valid easement over Black Bear Bend, or what has been referred to as the "upper road."

19. Since the Court issued its Order, the defendants have continued to obstruct the plaintiffs' access to their property over the upper road.

20. Without the use of such access granted to the plaintiffs by Cridlebaugh and recognized by the Court, the plaintiffs will not be able to complete the construction of their home on the premises or have reasonable year-round access to their property.

21. Since the defendants began obstructing the plaintiffs' access, the defendants have also engaged in a continuous pattern of harassing and threatening the plaintiffs and their guests visiting the property.

22. In addition to verbal threats and harassing statements, the defendants have brandished weapons and physically threatened the plaintiffs and their guests.

23. Defendants have continued to interfere with the plaintiffs' reasonable use and enjoyment of their property. Aside from blocking the plaintiffs' easement and otherwise harassing the plaintiffs, defendants Vance have constructed and maintained an unsightly junk pile on the property line they share with the plaintiffs.

24. On several occasions the defendants have also entered onto the plaintiffs' property without permission. Most recently, on February 11, 2010, Audrey Sweet entered onto the plaintiffs' property and threatened Mr. Hoch. Mrs. Sweet aggressively approached Mr. Hoch while waving her arms and papers at him and threatening to cause him physical injury.

JURISDICTION AND VENUE

25. Jurisdiction is proper in the district court pursuant to Idaho Code section 1-2210.

26. Venue is proper in the district court for the Second Judicial District pursuant to Idaho Code section 5-401.

COUNT I: NUISANCE

27. Plaintiffs reallege the material allegations set forth above and for a claim against the defendants further allege as follows:

28. The defendants' actions have interfered with the plaintiffs' reasonable use and comfortable enjoyment of their property.

29. The plaintiffs have been damaged as a direct and proximate result of the defendants' actions.

30. The defendants' actions have caused the plaintiffs to suffer damages in the form of discomfort, distress, inconvenience, and annoyance. Plaintiffs have also suffered damage in the form of expenses related to the delay in construction caused by the defendants' blocking of the easement and expenses associated with removing obstacles the defendants placed on the easement.

31. Unless the defendants Sweet and Vance are restrained from blocking the easement, the plaintiffs will be without reasonable year-round access to their property.

32. The plaintiffs are entitled to relief from the nuisances caused by the defendants in the form of an injunction, an award of damages, or abatement.

COUNT II: TRESPASS

33. Plaintiffs reallege the material allegations set forth above and for a claim against the defendants further allege as follows:

34. The defendants have repeatedly entered onto the plaintiffs' property without permission.

35. The defendants' unauthorized entrance onto the plaintiffs' land has interfered with the plaintiffs' right to exclusive possession of their property.

36. The plaintiffs have been damaged as a direct and proximate result of the actions of the defendants.

COUNT III: BREACH OF COVENANT

37. Plaintiffs reallege the material allegations set forth above and for a claim against the defendants further allege as follows:

38. The covenants contained in the Sweet and Vance Deeds were intended for the benefit of the property owned by the plaintiffs.

39. By maintaining a junk pile on the property line shared with the plaintiffs, defendants Vance have breached the covenant in their warranty deed requiring them to maintain their property in a clean and attractive manner.

40. By interfering with the plaintiffs' easement, threatening and harassing the plaintiffs and their guests, and trespassing onto the plaintiffs' property, the defendants have violated the covenant in their warranty deeds prohibiting noxious, illegal or offensive activity, nuisances, or actions that "materially interfere with the quiet enjoyment of each of the respective parcel owners."

41. The plaintiffs have been damaged as a direct and proximate result of the actions of the defendants.

COUNT IV: ASSAULT

42. Plaintiffs reallege the material allegations set forth above and for a claim against the defendants further allege as follows:

43. By physically threatening the plaintiffs, defendants Sweet intended to put plaintiffs in imminent apprehension of harmful or offensive bodily contact.

44. Defendants Sweet's act of aggressively approaching Mr. Hoch while making physical threats put Mr. Hoch in imminent apprehension of harmful or offensive contact.

45. The plaintiffs have been damaged as a direct and proximate result of the actions of the defendants.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray for relief as follows:

1. That the Court enter a judgment defining the location and dimensions of the plaintiffs' easement;

2. That the plaintiffs be awarded damages in an amount to be proven at trial;

3. That defendants be permanently enjoined from restricting the plaintiffs' access to their property through the upper road easement, from interfering with the plaintiffs' reasonable use and enjoyment of their land, from violating the restrictive covenants, and from further trespasses onto plaintiffs' property;

4. That plaintiffs be awarded costs and disbursements necessarily expended in bringing this action;

5. That plaintiffs be awarded reasonable attorney fees pursuant to Idaho Code sections 12-120 and 12-121; and

6. That plaintiffs be awarded such other and further relief as the Court may deem just.

DATED this 22nd day of June, 2010.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Theodore O. Creason, ISB # 1563
Attorney for Plaintiffs

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of June, 2010, a copy of the foregoing PLAINTIFFS' AMENDED COMPLAINT was served by the method indicated below and addressed to the following:

Edwin L. Litteneker Attorney at Law P. O. Box 321 322 Main Street Lewiston, ID 83501	X _____ _____ _____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION
W. Jeremy Carr Clark and Feeney 1229 Main Street P. O. Drawer 285 Lewiston, ID 83501	X _____ _____ _____	FIRST-CLASS MAIL HAND DELIVERED OVERNIGHT MAIL FAX TRANSMISSION

Theodore O. Creason, ISB #1563

EXHIBIT A

MICROFILM NO.
657867

INDEXED
FILMED
DELIVERED ( )
MAILED ( )

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto ROB VANCE and BECKY VANCE, husband and wife, the Grantees, whose current address is 14400-130th Avenue N.E., Kirkland, Washington 98034, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian.

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

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EXHIBIT
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C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

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EXHIBIT

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SUBJECT TO an easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2000 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this ___ day of October, 2000.

GRANTOR:

Jack W. Cridlebaugh

JACK W. CRIDLEBAUGH

INST. NO. 1657867
FILED FOR RECORD
FEE 12.00 PD. BY ALLIANCE TITL
2000 OCT 16 A 10:30
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Connie DEPUTY

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EXHIBIT

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 12th day of October, 2000, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

DANYELL SMITH NOTARY PUBLIC STATE OF IDAHO

Danyell Smith
Notary Public in and for the State of Idaho, residing at Lewiston.
My commission expires 01-12-2004

EXHIBIT

EXHIBIT B

MICROFILM

668025

INDEXED
FILMED
DELIVERED
MAILED

Aa.S.
JSR

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto JAKE SWEET and AUDREY SWEET, husband and wife, the Grantees, whose current address is 1516-8th St Clarkston WA 99403, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, including but not limited to the easements set forth in that certain Quitclaim Deed by and between MIKE T. McHARGUE, an unmarried man, as Grantor, and APC Co., as Grantee, recorded September 4, 1987 under Instrument No. 514248, records of Nez Perce County, Idaho, and that certain Warranty Deed by and between EVERETT CASSELL, also known as EVERETT J. CASSELL and BERYL A. CASSELL, husband and wife, as Grantors, and MICHAEL T. McHARGUE and MARY C. McHARGUE, husband and wife, as Grantee, recorded April 3, 1986 under Instrument No. 497394, records of Nez Perce County, Idaho, and that certain Easement by and between John Carpenter and Delia Carpenter, husband and wife, parties of the first part, and EVERETT J. CASSELL and BERYL A. CASSELL, husband and wife, parties of the second part, recorded under Instrument No. 401230, records of Nez Perce County, Idaho, and that certain Quitclaim Deed by and between PAUL N. WEINERT and GRACE WEINERT, husband and wife, to MIKE T. McHARGUE, a single man, recorded under Instrument No. 478091, records of Nez Perce County, Idaho.

TOGETHER WITH AND SUBJECT TO an easement for ingress and egress over and across existing roads located on the following described property: The East Half of the Northwest Quarter and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter all located in Section 22, Township 33 North, Range 4 West of the Boise Meridian, the Grantor reserving for himself, his heirs and assigns, said easements.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

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EXHIBIT
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A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the

EXHIBIT
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owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

SUBJECT TO an easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2001 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

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EXHIBIT

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this 10th day of October, 2001.

GRANTOR: Jack W. Cridlebaugh
JACK W. CRIDLEBAUGH

STATE OF IDAHO)
: ss
County of Nez Perce)

On this 10th day of October, 2001, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

Danyell Smith
Notary Public in and for the State of Idaho,
residing at Lewiston.
My commission expires 01-12-2004

INST. NO. 668025
FILED FOR RECORD
AT 12:00 REQ. BY ALLIANCE TITLE
2001 OCT 10 P 3:08
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Deputy DEPUTY

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EXHIBIT
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EXHIBIT C

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673441

WARRANTY DEED

For Value Received, JACK W. CRIDLEBAUGH, an unmarried person, as Grantor, does hereby grant, bargain, sell and convey unto JOHN M. HOCH and CAROLE D. HOCH, husband and wife, the Grantees, whose current address is 903 PROSPECT, LEWISTON, ID, all of his interest in the following described premises situate in the County of Nez Perce, State of Idaho, to-wit:

The West Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, official Records of Nez Perce County, Idaho.

SUBJECT TO AND TOGETHER WITH the rights and responsibilities set forth in the following easements:

1) Perpetual Reciprocal Easement by and between DALE R. TURNER and CAROLYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

2) Easement for a perpetual right-of-way and rights incidental thereto as set forth in a document to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

3) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CAROLYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

4) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

5) Easement for the purpose of ingress and egress and rights incidental thereto as set forth in a document recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho.

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EXHIBIT

6) Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E½NW¼) and the Northwest Quarter of the Southwest Quarter of the Northeast Quarter (NW¼ SW¼ NE¼) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

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EXHIBIT

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H. Outbuilding, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

TO HAVE AND TO HOLD the said premises with their appurtenances unto the said Grantees, their heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantees that he is the owner in fee simple of said premises; that they are free from all encumbrances except those set forth above, and taxes, levies and assessments for 2002 and thereafter; and that he will warrant and defend the same from all lawful claims whatsoever.

IN WITNESS WHEREOF, the said Grantor has hereunto set his hand and seal this 26th day of March, 2002.

GRANTOR:

Jack W. Cridlebaugh

JACK W. CRIDLEBAUGH

EXHIBIT

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STATE OF IDAHO)
: ss
County of Nez Perce)

On this 26th day of March, 2002, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared JACK W. CRIDLEBAUGH, known or identified to me to be the person whose name is subscribed to the within and foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

GARRY W. JONES NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho, residing at LEWISTON.

My commission expires 5-22-2004.

INST. NO 073441
FILED FOR RECORD
FEE 12.00 REG. BY ALLIANCE TITLE
2002 MAR 26 P 4:32
PATTY O. WEEKS
RECORDER, NEZ PERCE CO ID
BY Cindy Cook DEPUTY

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EXHIBIT

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EXHIBIT D

November 17, 2007

John and Carol

As friends and neighbors we are excited and happy for you that it appears construction of your new home is coming to completion. You certainly must be thrilled to see the building of your dream home coming into the final stages of assembly, as you approach the day that you too, get to move in and start enjoying the peace, quiet, seclusion, and enjoyment of country living here on the mountain.

With winter quickly approaching and the beauty of the changing season, Audrey and I were reflecting back on how much we have enjoyed our past several years living here. Probable like yourselves, our dream has always been to live away from all the hustle-bustle of city living, and enjoy a slower pace of peaceful, quiet, semi-seclusion, without all the noise, interruptions, and traffic associated with city living. So, with those thoughts still fresh in our minds, we wanted to again revisit the subject and previous conversations we have had regarding your use of our road. As you recall, during our initial discussions on this matter we granted you permission for construction access across our road and property to assist you and your contractors in having ready made access to your construction site. I think you would have to agree, that this construction access across our road and property has been most helpful in assisting you in a much timelier and substantially less costly approach to the construction of your new home! As neighbors we were happy to assist you in this way, as we too know that at this elevation you have a considerably shorter construction window than down in town.

While it appears that the majority of the construction of your new house is nearing completion, we know you still have some work that will likely be continuing over the next few months. As winter is quickly approaching and ground freeze and snow are already making a showing of the transition into winter, we have decided for the time

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being, to make no immediate changes to our previous permission for you to gain construction access to your home by entering and exiting it across our road and property. As always, we expect you and your contractors to treat the road with respect, maintain a slow and reasonable speed, watch for our grandchildren and dogs at play, and promptly assist with maintenance and repairs as needed and appropriate.

As I stated above, Audrey and my dream has always been to live away from all the hustle-bustle of city living, and enjoy a slower pace of peaceful, quiet, semi-seclusion, without all the noise, interruptions, and traffic associated with city life. Obviously, it is no surprise to either of us that this has not been the case since we granted you construction access for the building of your new house. To put it frankly, the traffic, not knowing who is coming and going, dust, dogs always barking at passing cars, and vehicles driving so close to our home is much more disturbing than we had ever anticipated; however, it is something that we have agreed to handle for a while longer and is truly the neighborly thing to do.

As your major construction will be coming to an end in the next month or so, we will be into the snowy freezing months of winter when outside work is almost impossible. Therefore, we don't feel it reasonable at this time to ask you to start building or using an alternate access route to your home, rather than the construction route you have been using across our road and property. However, you need to start planning now on upgrading your initial and legal access road to your home, such that any required construction or upgrade work on it can commence as soon as spring weather allows. Even with a late spring, there is no reason for you to not have your own access road to your new home completed by the end of June 2008. This gives you eight months to plan and obtain any needed permissions, permits, contractors, materials, or any other items that may be needed for the timely completion of your own road. Therefore, Audrey and I have agreed that your construction access to your home across our road and property will terminate as soon as your road is completed, and under no circumstances later than June 30, 2008.

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We feel as neighbors we have been very fair and patient in providing you construction access; however, as you know, it was never intended to be anything more than temporary for the purposes of construction. The removal of all outside traffic going across our place allows us both to get on with our lives and pursue our priorities. Having your own access road to your home allows you to monitor and control the access and security of your road, property, and dwellings. For us, no longer having outside traffic across our road and property allows us to monitor and control the access and security of our road, property, and dwellings.

I hope you don't find this letter to be a surprise or harsh, as neither are our intent. We are neighbors and we feel we have been and are continuing to do the right and neighborly thing, otherwise we would have never agreed to your construction access in the beginning. We just want to communicate this to you in writing to insure you clearly understand our position and timeline on the matter of your use of our road, and for everyone's safety, security, and overall well being that your use must come to an end in the not to distant future. If you have any questions or there is any portion of this letter that you don't understand please feel free to give us a call or drop by.

Best Regards,

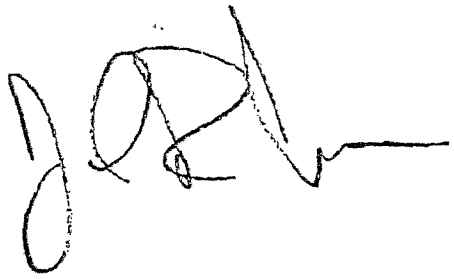

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EXHIBIT

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EXHIBIT E

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E

W. JEREMY CARR
Idaho State Bar No. 6829
CLARK and FEENEY
Attorneys for Defendants Vance
The Train Station, Suite 201
13th and Main Streets
P. O. Drawer 285
Lewiston, Idaho 83501
Telephone: (208)743-9516

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	CASE NO. CV 08-2272 **ANSWER TO PLAINTIFFS' AMENDED COMPLAINT AND COUNTERCLAIM**

COMES NOW the Defendants, ROB VANCE and BECKY VANCE, and answers Plaintiffs' Amended Complaint filed in the above-entitled matter as follows:

1. Defendants deny all allegations contained in the Amended Complaint unless specifically admitted herein.

2. Defendants admit the allegations contained in paragraph 1 through 16 of the Amended Complaint.

3. Defendants deny the allegations contained in paragraphs 17 of the Amended Complaint.

4. Defendants deny the allegations contained in paragraph 18 of the Amended Complaint.

5. Defendants deny the allegations contained in paragraphs 19 through 24 of the Amended Complaint.

6. Defendants admit paragraphs 25 and 26 of the Amended Complaint.

7. Defendants deny paragraphs 27 through 45 of the Amended Complaint.

COUNTERCLAIM

As a counterclaim against the plaintiffs, the defendants do complain and allege as follows:

I.

INTRODUCTION

This Counterclaim seeks declaratory relief as well as a claim for trespass and attorney fees. The underlying subject matter of this Counterclaim is real property owned by the defendants and adjacent real property owned by the plaintiffs located in Nez Perce County, State of Idaho.

II.

PARTIES

1. Plaintiffs John M. Hoch and Carolee D. Hoch are husband and wife.

2. Defendants Rob Vance and Becky Vance are husband and wife.

3. Defendants Rob Vance and Becky Vance are the owners of certain real property situate in the County of Nez Perce, State of Idaho more particularly described as follows:

> The East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian.
>
> TOGETHER WITH all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property.

RESERVING UNTO THE GRANTOR, his heirs and assigns, all easements for ingress and egress running from public right-of-way to the above described real property which are appurtenances to said real property, together with an easement over and across all roadways presently existing on the property herein being conveyed.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E1/2NW1/4) and the Northwest Quarter of the Southwest of the Northeast Quarter (NW1/4SW1/4NE1/4) all located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standings garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

SUBJECT TO Perpetual Easement by and between DALE R. TURNER and CaroleYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March, 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

SUBJECT TO an easement for a perpetual right-of-way incidental thereto as set forth in a document to DALE R. TURNER and CaroleYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CaroleYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

SUBJECT TO an easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

4. Plaintiffs John Hoch and Carole Hoch are the owners of certain real property situate in the County of Nez Perce, State of Idaho more particularly described as follows:

The West Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian.

SUBJECT TO AND TOGETHER WITH the rights and responsibilities set forth in the following easements:

1) Perpetual Easement by and between DALE R. TURNER and CaroleYN J. TURNER, husband and wife, and RANDALL P. RUCKDASHEL and KAREN RAE RUCKDASHEL, husband and wife, and MIKE McHARGUE, recorded March, 21, 1995 as Instrument No. 596083, records of Nez Perce County, Idaho.

2) Easement for a perpetual right-of-way incidental thereto as set forth in a document to DALE R. TURNER and CaroleYN J. TURNER, husband and wife, JACK CRIDLEBAUGH, an unmarried man, and TERRY A. CLACK and BETTY L. CLACK, Trustees of the Clack Family Revocable Trust, recorded July 29, 1997 as Instrument No. 622759, records of Nez Perce County, Idaho.

3) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to DALE R. TURNER and CaroleYN J. TURNER, husband and wife, recorded July 29, 1997 as Instrument No. 622760, records of Nez Perce County, Idaho.

4) Easement for the purpose of public utilities and rights incidental thereto as set forth in a document granted to CLEARWATER POWER COMPANY, recorded January 26, 1998 as Instrument No. 628290, records of Nez Perce County, Idaho.

5) Easement for the purpose of ingress and egress and rights incidental thereto as set forth in a document recorded October 16, 2000 as Instrument No. 657867, records of Nez Perce County, Idaho.

6) Easement for the purpose of ingress and egress and rights incidental thereto as reserved in a Warranty Deed recorded October 10, 2001 as Instrument No. 668025, records of Nez Perce County, Idaho.

SUBJECT TO the following Restrictive Covenants:

A. No parcel shall be subdivided into smaller parcels without the Grantor's written consent, which written consent Grantor shall not be required to give as long as he owns any portion of the following described real property:

The East Half of the Northwest Quarter (E1/2NW1/4) and the Northwest Quarter of the Southwest of the Northeast Quarter (NW1/4SW1/4NE1/4) all

located in Section 22, Township 33 North, Range 4, West of the Boise Meridian.

This Restriction shall terminate and be of no further force or effect five (5) years after the date this Warranty Deed is recorded.

B. Temporary structures, such as utility trailers or 5th wheelers shall NOT be utilized as residences, or storage facilities, on the property. This restriction shall not apply during the construction of permanent dwellings, PROVIDED this restriction waiver shall not exceed one (1) year;

C. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

D. Each parcel shall be kept in a clean and attractive manner.

E. No logging trucks or heavy construction equipment shall be allowed to remain on the premises more than 36 consecutive hours. This shall not prohibit the temporary use of heavy construction equipment for the preparation of building sites or access roads from the primary right of way to permanent structures.

F. No unpainted corrugated or galvanized metal may be used for roofing materials; the intent of this restriction being to minimize glare.

G. All buildings must either be manufactured homes constructed within four (4) years of the date said manufactured home is placed on the lot, or buildings constructed on the parcel from raw building materials.

H. Outbuilding, such as barns, shops or free-standings garages, shall be similar in design to and compliment the structure constructed on the parcel.

I. No fences shall be built on the roads or rights-of-way.

J. The exterior of any structure, resident or outbuildings shall be completed within one year of obtaining proper building permits. During the period of construction, the owner shall cause the premises to be kept free and clear of debris and waste matter and shall cause all such debris and waste matter to be disposed of in a proper manner so that the same imposes no interference or detraction to adjoining property.

K. ANIMALS: No animals except dogs, cats, other household pets may be placed, kept, bred or maintained on the premises.

L. REMEDIES. Either Grantor or Grantees may enforce the restrictions and conditions set forth above; however, neither party shall be obligated to enforce such terms.

III.

FACTUAL ALLEGATIONS

5. Defendants' and Plaintiffs' properties are adjacent to each other and share a common boundary. The location of this boundary is in dispute.

6. Defendants and Plaintiffs both purchased their properties from Jack Cridlebaugh. Defendants and both parties were notified at time of sale that no real survey was performed, as noted in Perpetual Right of Way Easement #622759.

7. Approximately in the summer of 2005 the Plaintiffs began constructing a home on their property. Defendants discussed with Plaintiffs on many occasions, prior to Plaintiffs starting construction on their property, the need to have a survey done so the Plaintiffs would not build on Defendants' property. Plaintiffs refused to have a survey done and began construction on their home crowding the edge of the Defendants property and in some instances building onto Defendants' property, and excavating and removing trees located on Defendant's property. Plaintiffs actions were without regard to Defendants rights to their property.

8. Approximately in 2005 the Plaintiffs' and their agents began driving across Defendants' property without right or permission.

9. On or about July 2008 Defendants' had Cuddy & Associates perform a survey on the boundary lines of the parties adjacent property lines. A copy of the survey is marked as Exhibit "A" and incorporated herein by reference.

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10. On or about August 23, 2008, Defendant sent Plaintiffs a written demand letter requesting they cease and desist their construction activities on Defendants' property. Plaintiffs John and Carole Hoch still refuse to cease and desist their construction activities on Defendants' property. Further, Plaintiffs have failed to remove their property from Defendants' real property despite repeated request by Defendant.

IV.

DECLARATORY JUDGMENT

11. Defendants reallege all foregoing allegations.

12. At all times mentioned Defendants were, and now are, the owners in fee simple of the aforementioned real estate described above under a deed of conveyance.

13. As a consequence of the Plaintiffs aforementioned acts, Plaintiffs contest the true location of the boundary line. All of the above named Plaintiffs, known and unknown, claim an interest in the property adverse to Defendant's undivided fee simple interest in said real property. Plaintiffs' claims are without any right whatever and Plaintiffs have no right, estate, title, lien or interest in or to Defendants' undivided interest in fee simple to said property, or any part thereof.

14. The above described claims of the Plaintiffs constitute a cloud on Defendants' title and prevent Defendants from the complete enjoyment and use of said property. As a further consequence of such acts of the Plaintiffs, some of the real property that is owned by Defendants is out of the possession of the Defendants and in possession of the Plaintiffs, to the injury of the Defendants.

15. The Court should declare that the survey line is the boundary line of the parties property and declare Defendants as the owner in fee of the premises in question to the exclusion of the Plaintiffs. Further, the Court should issue a permanent injunction enjoining Plaintiffs from

interfering with Defendants use of the aforementioned property, including but not limited to enjoining Plaintiffs' from driving across Defendants' property.

V.

TRESPASS

16. Defendants reallege all foregoing allegations.

17. From July 2, 2009, to the present, Plaintiffs and their agents, and employees, knowingly and willfully entered onto Defendants' land, and without legal right and without the Defendants' knowledge or consent, willfully and intentionally engaged in excavation, and engaged in construction activities, including the construction of permanent structures, and causing construction debris on Defendants' land. Said Plaintiffs converted the removed trees for their own use.

18. Plaintiffs and their agents, employees, knowingly built a road across and drove across the southern portion of Defendants' land without legal right and without Defendants' knowledge or consent, willfully and intentionally.

19. Plaintiffs, and their agents and employees, knowingly trespassed on Defendants' property and caused construction debris to accumulate on Defendants' property.

20. By reason of the above acts, Defendants sustained both general and special damages.

VI.

BREACH OF RESTRICTIVE COVENANTS

21. Defendants reallege all foregoing allegations.

22. Plaintiffs are in violation of the Restrictive Covenants J and D contained in the above-referenced Warranty Deed(s) in that the Plaintiffs have left litter and/or construction debris

on the property and have caused or allowed construction to accumulate on Defendants' property and failed to complete the construction in the allotted time.

23. By reason of the above acts, Defendants sustained both general and special damages.

VI

ATTORNEY FEES

24. As a further and direct consequence of Plaintiffs' actions, the Defendants have been required to retain W. Jeremy Carr of the law firm of CLARK and FEENEY, to prosecute this action. Defendants are entitled to recover their costs and fees in this matter pursuant to Idaho Code §12-121 and Idaho Code § 6-202.

VII.

PRAYER FOR RELIEF

WHEREFORE, Defendants respectfully pray for relief and for judgment against the Plaintiffs as follows:

1. For an order restraining Plaintiffs and their agents, servants, employees, guests, invitees and others acting under their direction and authority during the pendency of this action, and thereafter permanently, from entering Defendants' premises and from interfering in any way with Defendants' possession, use and enjoyment of the property, or from accessing or driving across their property and from violating the restrictive covenants.

2. For damages against the Plaintiffs on all causes of action alleged herein in an amount to be proven at trial, which amount is expected to well exceed $10,000.00;

3. For an order requiring the Plaintiffs' to remove the items they placed on Defendants' property and to restore the property to its natural appearance.

4. That the Court adjudge and decree that Defendants are the owners in fee of the real property and that Defendants are in possession and entitled to possession of the real property, and retain jurisdiction to enforce the decree.

5. For an award of reasonable attorney fees and costs necessarily incurred in this action.

6. For such other and further relief as the Court deems reasonable and just.

DATED this 29th day of July, 2010.

CLARK AND FEENEY

By: _____
W. Jeremy Carr
Attorney for Defendants Vance

STATE OF IDAHO)
) ss.
County of Nez Perce)

BECKY VANCE, being first duly sworn on oath, deposes and says:

That she is one of the Defendants above named, that she has read the foregoing complaint, and the contents thereof and the facts stated therein are true to the best of her knowledge, information and belief.

_____
BECKY VANCE

SUBSCRIBED and SWORN to before me, this 28th day of July, 2010.

_____
Notary Public in and for the State of Idaho
Residing at Lewiston, therein.
My commission expires: 3-20-16

JAIME McCARTHY NOTARY PUBLIC STATE OF IDAHO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2010, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Theodore O. Creason Creason, Moore, Dokken & Geidl 1219 Idaho Street PO Drawer 835 Lewiston, ID 83501	☐ ☒ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy
Edwin L. Litteneker Attorney at Law PO Box 321 322 Main St. Lewiston, ID 83501	☐ ☒ ☐ ☐	U.S. Mail Hand Delivered Overnight Mail Telecopy

By: _____
Attorney for Defendants Vance

344

LAW OFFICES OF
CLARK AND FEENEY, LLP
LEWISTON, IDAHO 83501

Edwin L. Litteneker
Attorney at Law
Post Office Box 321
322 Main Street
Lewiston, Idaho 83501
Telephone: (208) 746-0344
Facsimile: (208) 798-8387
ISB No. 2297

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, v. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	Case No. CV 08-2272 **ANSWER TO AMENDED COMPLAINT & COUNTERCLAIM**

COME NOW Defendants, Jake Sweet and Audrey Sweet, wife and husband, by and through their attorney of record, Edwin L. Litteneker and answers the Plaintiff's Amended Complaint and Counterclaims against the Plaintiff's as follows:

1. Defendants, Jake Sweet and Audrey Sweet admit paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 11, 13, 14, 25 and 26 of Plaintiffs' Amended Complaint.

2. Defendants, Jake Sweet and Audrey Sweet deny paragraphs 8, 10, 12, 16, 17, 18 19- 45 of Plaintiffs Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

The Plaintiffs have failed to state a claim.

SECOND AFFIRMATIVE DEFENSE

The Plaintiffs should be estopped from claiming any interest in the property of the Defendants Sweet.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff's have proceeded in this matter with unclean hands and are not entitled to the equitable remedy sought herein.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiffs' have failed to name indispensable parties.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiffs' claim is frivolous.

The Defendants Sweets reserve the right to add parties, claims, or defenses based upon discovery in this matter.

COUNTERCLAIM

As counterclaim against the Plaintiffs the Defendants, Jake Sweet and Audrey Sweet do complain and allege as follows:

1. Parties.

1.1 Plaintiffs John M. Hoch and Carole D. Hoch are husband and wife.

1.2 Defendants Jake Sweet and Audrey Sweet are husband and wife.

1.3 Plaintiffs John M. Hoch and Carole D. Hoch are owners of certain real property situate in the County of Nez Perce, State of Idaho more particularly described as follows:

The West half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official records of Nez Perce County, Idaho.

1.4 Defendants Jake Sweet and Audrey Sweet are owners of certain real property situate in the County of Nez Perce, State of Idaho more particularly described as follows:

The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

2. Factual Allegations.

2.1 Sweet has constructed at their sole expense a roadway commencing at Stage Coach Road and proceeding in a Southeasterly direction, then east which ends at their residence.

2.2 Such roadway was constructed by Sweet's sole expense and provision of labor, contracted labor and the purchase of materials necessary to build the roadway.

2.3 Such roadway did not exist prior to Sweet's construction of the roadway.

2.4 Hoch has constructed a residence on the real property owned by them. In connection with the construction of the home, excavation occurred which resulted in excess material excavation from Hoch's excavation being deposited on Sweet's property.

3. Trepass.

3.1 Defendants Jake Sweet and Audrey Sweet reallege all foregoing allegations.

3.2 In approximately July of 2004 without permission from the Sweet's,

Hoch, their agents or employees deposited rock on the Sweet's property.

3.3 Such rock remains located on the Sweet property without Sweet's permission and is a continuing trespass.

3.4 Such rock continues to affect the use of the Sweet property.

3.5 Sweet is damaged by the rock being deposited on Sweet's property by Hoch.

4. Unjust Enrichment.

4.1 Defendants Jake Sweet and Audrey Sweet reallege all foregoing allegations.

4.2 If such roadway is determined to be real property within which Hoch has an interest, the real property of sweet was improved to its present condition without any contribution, participation or expense by Hoch.

4.3 Should Hoch be entitled to use such improvements as constructed by Sweet, Hoch and Hoch's real property interest are unjustly enriched by the actions of Sweet.

4.4 Hoch should compensate Sweet in an amount to be determined by the Court based upon the expenses, costs, labor and materials incurred by Sweet to improve the real property interest of Hoch.

3. **Attorney Fees.** The Defendants, Jake and Audrey Sweet have engaged the services of the undersigned in the defense and pursuant of this matter and have incurred attorney fees and costs. Such fees and costs should be paid by the Plaintiff pursuant to Idaho Code § 12-120, Idaho Code § 12-121, Idaho Code § 45-612, and I.C. § 6-202.

WHEREFORE Defendants, Jake Sweet and Audrey Sweet pray for relief as follows:

1. That the Plaintiffs' Complaint be dismissed with prejudice as it relates to the Defendants, Jake Sweet and Audrey Sweet.
2. That the Court deny any injunction or restraint of Jake Sweet and Audrey Sweets' future actions.
3. That Hoch be required to remove such rock placed on Sweet's property without permission by Hoch.
4. That Sweet receive damages for Hoch's trespass and unjust enrichment as the Court may determine appropriate.
5. An award of attorney fees and costs to the Defendants, Jake Sweet and Audrey Sweet.
6. For other such relief as the Court deems just and equitable.

DATED this 3 day of August, 2010.

Edwin L. Litteneker
Attorney at Law

STATE OF IDAHO)
)
County of Nez Perce)

Jake Sweet and Audrey Sweet being first duly sworn upon oath deposes and states as follows:

We are one of the about named defendants named herein. We have read the foregoing document and know the contents thereof and the facts stated therein are true to the best of our knowledge.

Jake Sweet

Audrey Sweet

SUBSCRIBED AND SWORN to before me a Notary Public on this 3 day of August, 2010.

HALEY J. GIBSON
NOTARY PUBLIC
STATE OF IDAHO

NOTARY PUBLIC in and for the State of Idaho.
Residing at Lewiston
My Comm. Exp 3-31-2015

I DO HEREBY CERTIFY that a true

and correct copy of the foregoing document was:

_V_ mailed by regular first class mail, and deposited in the United States Post Office

_____ sent by facsimile

_____ sent by Federal Express, overnight delivery

_____ hand delivered

To: Theodore O. Creason
Creason, Moore, Dokken & Geidl, PLLC
P.O. Drawer 835
Lewiston, ID 83501

W. Jeremy Carr
Clark & Feeney
P.O. Box 285
Lewiston, ID 83501

on this 3 day of August, 2010.

Edwin L. Litteneker

Theodore O. Creason, ISB# 1563
CREASON, MOORE, DOKKEN & GEIDL, PLLC
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
Telephone: (208) 743-1516
Facsimile: (208) 746-2231
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	**Case No. CV08-2272** **ANSWER TO DEFENDANT VANCES' COUNTERCLAIM**

For answer to defendant Vances' Counterclaim, the plaintiffs, John M. Hoch and Carole D. Hoch, husband and wife, admit, deny, and allege as follows:

RESPONSES TO ALLEGATIONS IN COUNTERCLAIM

1. As to the allegations set forth in defendant Vances' Counterclaim, the plaintiffs deny all allegations not specifically admitted herein.

2. Plaintiffs admit the allegations set forth in paragraph 1.

3. Plaintiffs admit the allegations set forth in paragraph 2.

4. Plaintiffs admit that defendants, Rob Vance and Becky Vance, are the owners of a parcel of real property described as "the East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian." The plaintiffs deny that the remaining allegations set forth in paragraph 3 describe the property owned by the defendants Vance.

5. Plaintiffs admit the allegation set forth in paragraph 4 that the plaintiffs are the owners of a parcel of real property described as "the West Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian." Plaintiffs deny that the foregoing description is a complete and accurate description of their property. Plaintiffs further deny that the remaining allegations set forth in paragraph 4 describe the property owned by the plaintiffs.

6. Plaintiffs admit the allegation in paragraph 5 that plaintiffs' property is adjacent to defendant Vances' property and that the two parcels share a common boundary. Plaintiffs deny that the location of the common boundary is in dispute.

7. Plaintiffs admit that before purchasing their property, they were notified that no survey had been performed. Plaintiffs are without sufficient knowledge to admit or deny whether defendants Vance were notified at the time of sale that no survey had been performed.

8. Plaintiffs admit that they began constructing a home on their property in the summer of 2005 and that they discussed obtaining a survey with the defendants Vance.

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Plaintiffs deny the remaining allegations set forth in paragraph 7 of the defendants' Counterclaim.

9. Plaintiffs deny the allegations set forth in paragraph 8.

10. Plaintiffs admit the allegations contained in paragraph 9.

11. Plaintiffs lack sufficient knowledge to admit or deny the allegation set forth in paragraph 10 of the defendants' Counterclaim alleging that the defendants sent plaintiffs a written demand letter. Plaintiffs deny the remaining allegations contained in paragraph 10.

12. Plaintiffs deny the allegations set forth in paragraph 11 to the extent it incorporates allegations previously denied by the plaintiffs.

13. Plaintiffs admit the allegations set forth in paragraph 12.

14. Plaintiffs deny the allegation set forth in paragraph 13.

15. Plaintiffs deny the allegations set forth in paragraph 14.

16. Plaintiffs deny the allegations set forth in paragraph 15.

17. Plaintiffs deny the allegations set forth in paragraph 16 to the extent it realleges allegations previously denied by the plaintiffs.

18. Plaintiffs deny the allegations set forth in paragraph 17.

19. Plaintiffs deny the allegations set forth in paragraph 18.

20. Plaintiffs deny the allegations set forth in paragraph 19.

21. Plaintiffs deny the allegations set forth in paragraph 20.

22. Plaintiffs deny the allegations set forth in paragraph 21 to the extent it realleges allegations previously denied by the plaintiffs.

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23. Plaintiffs deny the allegations set forth in paragraph 22.

24. Plaintiffs deny the allegations set forth in paragraph 23.

25. Plaintiffs deny the allegations set forth in paragraph 24.

AFFIRMATIVE DEFENSES

As affirmative defenses, the plaintiffs allege and state:

1. Defendant Vances' Counterclaim fails to state a claim upon which relief can be granted.

2. The defendants' Counterclaim is barred under the doctrine of res judicata.

3. The defendants' Counterclaim is barred under the doctrine of equitable estoppel.

4. The defendants' Counterclaim is barred by accord and satisfaction and/or under the doctrine of laches.

5. Defendants previously released the plaintiffs from any liability stemming from the allegations raised in the defendants' Counterclaim.

6. The defendants acted with unclean hands and are not entitled to equitable relief.

WHEREFORE, plaintiffs demand that defendants' Counterclaim be dismissed, that defendants take nothing thereby, that the plaintiffs be awarded their costs incurred herein, including attorney fees, and that plaintiffs be granted such other and further relief as the Court may deem warranted.

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DATED this 11th day of August, 2010.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Theodore O. Creason
Attorney for Plaintiffs
John and Carole Hoch

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of August, 2010, a copy of the foregoing ANSWER TO DEFENDANT VANCES' COUNTERCLAIM was served by the method indicated below and addressed to the following:

Edwin L. Litteneker	X	FIRST-CLASS MAIL
Attorney at Law		HAND DELIVERED
P. O. Box 321		OVERNIGHT MAIL
322 Main Street		FAX TRANSMISSION
Lewiston, ID 83501		798-8387
W. Jeremy Carr	X	FIRST-CLASS MAIL
Clark and Feeney		HAND DELIVERED
1229 Main Street		OVERNIGHT MAIL
P. O. Drawer 285		FAX TRANSMISSION
Lewiston, ID 83501		746-9160

Theodore O. Creason, ISB # 1563

Creason, Moore, Dokken & Geidl, PLLC
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Theodore O. Creason, ISB# 1563
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Telephone: (208) 743-1516
Facsimile: (208) 746-2231
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	**Case No. CV08-2272** **ANSWER TO DEFENDANT SWEETS' COUNTERCLAIM**

For answer to defendant Sweets' Counterclaim, the plaintiffs, John M. Hoch and Carole D. Hoch, husband and wife, admit, deny, and allege as follows:

RESPONSES TO ALLEGATIONS IN COUNTERCLAIM

1. As to the allegations set forth in defendant Sweets' Counterclaim, the plaintiffs deny all allegations not specifically admitted herein.

2. Plaintiffs admit the allegations set forth in paragraph 1.1.

3. Plaintiffs admit the allegations set forth in paragraph 1.2.

4. Plaintiffs admit the allegations set forth in paragraph 1.3.

5. Plaintiffs admit the allegations set forth in paragraph 1.4.

6. Plaintiffs deny the allegations set forth in paragraph 2.1.

7. Plaintiffs deny the allegations set forth in paragraph 2.2.

8. Plaintiffs deny the allegations set forth in paragraph 2.3.

9. Plaintiffs admit that they have constructed a residence on real property owned by them as alleged in paragraph 2.4. Plaintiffs deny the remaining allegations set forth in paragraph 2.4.

10. Plaintiffs deny the allegations contained in paragraph 3.1 to the extent it realleges facts already denied by the plaintiffs.

11. Plaintiffs deny the allegations set forth in paragraph 3.2.

12. Plaintiffs deny the allegations set forth in paragraph 3.3.

13. Plaintiffs deny the allegations set forth in paragraph 3.4.

14. Plaintiffs deny the allegations set forth in paragraph 3.5.

15. Plaintiffs deny the allegations set forth in paragraph 4.1 to the extent it realleges facts already denied by the plaintiffs.

16. Plaintiffs deny the allegations set forth in paragraph 4.2.

17. Plaintiffs deny the allegations set forth in paragraph 4.3.

18. Plaintiffs deny the allegations set forth in paragraph 4.4.

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(208)743-1516; Fax (208)746-2231

AFFIRMATIVE DEFENSES

As affirmative defenses, the plaintiffs allege and state:

1. Defendant Sweets' Counterclaim fails to state a claim upon which relief can be granted.

2. The defendants' Counterclaim is barred under the doctrine of equitable estoppel.

3. The defendants' Counterclaim is barred under the doctrine of laches.

4. The defendants acted with unclean hands and are not entitled to equitable relief.

WHEREFORE, plaintiffs demand that defendants' Counterclaim be dismissed, that defendants take nothing thereby, that the plaintiffs be awarded their costs incurred herein, including attorney fees, and that plaintiffs be granted such other and relief as the Court may deem warranted.

DATED this 11th day of August, 2010.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Theodore O. Creason
Attorney for Plaintiffs
John and Carole Hoch

Creason, Moore, Dokken & Geidl, PLLC
P.O. Drawer 835, Lewiston ID 83501
(208)743-1516; Fax (208)746-2231

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 11th day of August, 2010, a copy of the foregoing ANSWER TO DEFENDANT SWEETS' COUNTERCLAIM was served by the method indicated below and addressed to the following:

Edwin L. Litteneker	X	FIRST-CLASS MAIL
Attorney at Law		HAND DELIVERED
P. O. Box 321		OVERNIGHT MAIL
322 Main Street		FAX TRANSMISSION
Lewiston, ID 83501		798-8387
W. Jeremy Carr	X	FIRST-CLASS MAIL
Clark and Feeney		HAND DELIVERED
1229 Main Street		OVERNIGHT MAIL
P. O. Drawer 285		FAX TRANSMISSION
Lewiston, ID 83501		746-9160

Theodore O. Creason, ISB # 1563

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	CASE NO. CV 08-2272 MEMORANDUM DECISION AND ORDER

This case comes before me on the Hochs's motion for judgment on the pleadings based on claim preclusion.

I. PROCEDURAL HISTORY

On July 2, 2009, the Hochs and Vances settled various property claims against each other through a mediation agreement. On July 13, 2009, pursuant to that agreement, all of the Vances's previously asserted counterclaims were dismissed with prejudice.

However, new disagreements have arisen, and, on June 23, 2010, the Hochs filed an Amended Complaint. In response, the Vances answered and counterclaimed, asserting trespass and breach of restrictive covenants claims, and asking for a declaratory judgment establishing the boundary line between the parties' properties. The Hochs now move for judgment on the pleadings concerning those counterclaims.

II. CONTENTIONS

The Hochs assert that all of the Vances's current counterclaims mirror their prior counterclaims that were dismissed with prejudice. The Hochs therefore contend that the Vances should be precluded from asserting their counterclaims. Further, the Hochs also contend that it is frivolous to assert claims identical to those previously dismissed with prejudice, and therefore the Vances's lawyer, Mr. Carr, has violated I.R.C.P. § 11, and should be liable for the reasonable attorneys' fees incurred to bring this motion.

The Vances did not present any argument to justify the assertion of the breach of restrictive covenants claim. As to the trespass claim, the Vances contend that it is not precluded because it asserts acts of trespass occurring after the date of settlement; and after the date of dismissal. Concerning the claim for a declaratory judgment, the Vances contend that it is necessary to reassert that claim because the judgment establishing the property boundary was never filed as it should have been, pursuant to the settlement agreement.

III. STANDARD OF REVIEW

When an I.R.C.P. § 12(c) motion is decided on evidence in addition to the pleadings, the court must treat and dispose of the motion as one for summary judgment under I.R.C.P. § 56. *Smith v. Great Basin Grain Co.*, 98 Idaho 266, 273 (1977) (citing *Cook v. Soltman*, 96 Idaho 187, 188 (1974), *disagreed with on other grounds* by *Stoner v. Carr*, 97 Idaho 641, 643-44 (1976)). Because I consider the Hochs's exhibits, in addition to the pleadings, I must decide this motion as a Rule 56 motion for summary judgment.

Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. § 56(c).

Furthermore, this court must draw all reasonable inferences in favor of the non-moving party, *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517 (1991).

IV. DISCUSSION

A. The Vances's Claim for Declaratory Judgment is Precluded Because it is Identical to one Previously Dismissed With Prejudice.

A claim is certainly precluded when it is identical to one previously asserted but dismissed with prejudice. *See Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 614 (1992) (citing *Diamond v. Farmers Ins.*, 119 Idaho 146, 148 (1990)). In this case, the Vances's counterclaim asking for a declaratory judgment is an exact copy of the claim for declaratory judgment that was previously dismissed with prejudice. Additionally, the facts relied on are the same. Therefore, the current declaratory judgment claim is precluded.

B. The Vances's Claim of Breach of Restrictive Covenants is Partially Precluded Because it Arose out of the Same "Transaction of Series of Transactions" as the Claims Previously Dismissed.

A claim need not be identical to one previously dismissed in order for preclusion to apply. Rather, all claims are precluded that arise out of the "same transaction or series of transactions" as claims previously dismissed. *Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 150 (1990).

The Vances's claim of breach of restrictive covenants asserts in part that the Hochs are in violation of a covenant requiring that all construction of buildings be completed within one year. Although the Vances's did not assert this violation in their prior, dismissed, claim, they did assert other harms in connection with the Hochs's construction activities, and that the Hochs began construction of their home in 2005. Therefore, the violation of the covenant was present at the time of the dismissal and was part of the same transaction making up the Vances's prior claims: construction activities by the Hochs. Thus, the part of the Vances's current claim for

breach of covenants based on taking more than one year to construct a building is precluded.

The Vances's claim of breach of restrictive covenants also asserts that the Hochs have violated restrictions requiring that all parcels be kept "clean and attractive" and "free and clear of debris." This portion of the claim asserts that, due to the Hochs's construction activities, the Hochs's property is untidy, in violation of the restrictions.

Again, this claim arises out of the same transaction as the dismissed claims: the Hochs's construction activities. However, there is an exception to the "same transaction" rule where the claimant did not know, nor should have known, the facts supporting a claim arising from the same transaction. *See Kawai Farms, Inc. v. Longstreet*, 121 Idaho 610, 614 (1992). It is unclear in this case whether or not the clutter complained of existed prior to the dismissal. If not, then the Vances could not have known of the facts supporting their claim, and the claim would not be precluded. Because I must draw all inferences in favor of the non-moving party, the Vances, I must conclude that the trash complained of is not any that was present prior to the previous dismissal. Therefore, claim preclusion does not bar the Vances's claim of breach of restrictive covenants so far as it is based on the untidiness of the Hochs's property.

C. The Vances's Trespass Claim is not Precluded Because it is Based on Facts Arising After the Dismissal.

The Vances's trespass claim mirrors the claim previously dismissed, except that it states that the acts of trespass occurred from July 2, 2009 (the date of the mediation agreement) to the present. All of the alleged trespasses are related to the Hochs's construction activities, and therefore arise out of the same transaction or occurrence as the Vances's dismissed claims. However, the Vances's counsel stated in oral argument on this motion that the general allegations in their statement of their trespass claim are meant to allege that, since the time of the mediation agreement and dismissal, the Hochs have deposited new construction debris in new locations on

the Vances's property and have driven vehicles across new parts of the Vances's property that the Hochs have no legal right to cross. Because I must draw all inferences in favor of the Vances, I must infer that the language of the current trespass claim is meant to allege trespassory acts not occurring prior to the dismissal of the Vances's prior claims. The Vances's trespass claim is therefore not precluded, as it facts occurring after the dismissal.

D. Mr. Carr is Liable for Rule 11 Sanctions for Asserting the Claim for Declaratory Relief.

I.R.C.P. § 11 calls for the imposition of sanctions against the one signing a pleading if a claim is brought to "harass or to cause unnecessary delay or needless increase in the cost of litigation." In this case, I can see no other purpose in the assertion of the claim for declaratory relief other than to retaliate by increasing the Hochs's litigation costs.

The claim is identical to one previously dismissed with prejudice. In their "Opposition to Plaintiffs' Motion for Judgment on the Pleadings," the Vances argued, without submitting any evidence, that the basis of all of their counterclaims was that the Hochs were not in compliance with the Mediation Agreement. Even assuming this explanation as fact, it is not a justification for the request for a declaration as to the location of the property boundary. So, at oral argument, Mr. Carr had created a new justification: due to an oversight by himself, an agreed order as to the property boundary had not been filed since the agreement. Although this may be a justification for why an order as to the location of the property boundary is justified, it is not a justification for re-asserting a previously dismissed claim. Mr. Carr simply needed to contact the Hochs's counsel and request that they agree to an order establishing the property line agreed to in mediation.

Because Mr. Carr is the one who signed the answer and counterclaim, he is liable. As only one of the three claims in this case was brought for an improper purpose, sanctions are

limited to one-third of the reasonable attorneys' fees incurred by the Hochs to bring this motion.

V. CONCLUSION

The Vances's claim for declaratory judgment is precluded because an identical claim was previously dismissed with prejudice. Additionally, their claim for breach of the restrictive covenant requiring that construction activities be completed within a year is precluded because it arises from the same transaction as previously dismissed claims: the Hochs's construction activities. However, the claims of trespass and breach of the restrictive covenant requiring premises be kept free of construction debris are not precluded. Although both are related to the same transaction as claims previously dismissed, they both assert facts occurring after the dismissal, and therefore preclusion does not apply.

The claim for declaratory judgment was brought without any discernible purpose other than to increase the costs of litigation. Therefore, Mr. Carr, as the signatory to the Vances's answer and counterclaim, is liable to the Hochs for the attorneys' fees that can be attributed to defending the declaratory judgment counterclaim: one-third of the total incurred in bringing the motion for judgment on the pleadings.

VI. ORDER

For the reasons stated above, the Hochs's motion for judgment on the pleadings is GRANTED as to the Vances's claim for declaratory relief. The Hochs's motion for judgment on the pleadings is GRANTED as to the Vances's claim of a violation of restrictive covenants by taking more than one year to complete construction. The Hochs's motion for judgment on the pleadings is DENIED as to the Vances's claim of a violation of restrictive covenants by not keeping the Hoch property free of construction debris. The Hochs's motion for judgment on the pleadings is DENIED as to the Vances's claim of trespass. Mr. W. Jeremy Carr is ordered to pay

to the Hochs one-third of the fees incurred in bringing their motion.

IT IS SO ORDERED, this the 25 day of October 2010

JOHN BRADBURY
DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I, the undersigned, a Deputy Clerk of the above entitled Court, do hereby certify that a copy of this document was mailed or delivered on the 25 day of October, 2010 to the following persons:

W. Jeremy Carr Clark and Feeney The Train Station, Ste. 201 13th and Main Streets P.O. Drawer 285 Lewiston, ID 83501	[ ] U.S. Mail [ ] Overnight Mail [X] Fax [ ] Hand Delivery
Theodore O. Creason Creason, Moore, Dokken & Geidl 1219 Idaho Street P.O. Drawer 835 Lewiston, ID 83501	[ ] U.S. Mail [ ] Overnight Mail [X] Fax [ ] Hand Delivery
Edwin L. Litteneker 322 Main St. P.O. Box 321 Lewiston, ID 83501	[ ] U.S. Mail [ ] Overnight Mail [X] Fax [ ] Hand Delivery

PATTY O. WEEKS

~~CARRIE BIRD, CLERK~~

By: _____
Deputy Clerk

SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY · CLERK OF DISTRICT COURT
EX-OFFICIO AUDITOR AND RECORDER
STATE OF IDAHO

Theodore O. Creason, ISB # 1563
CREASON, MOORE, DOKKEN & GEIDL, PLLC
1219 Idaho Street
P.O. Drawer 835
Lewiston, ID 83501
(208) 743-1516
Fax: (208) 746-2231
Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	Case No. CV08-2272 **ORDER**

The Stipulation of the parties dated November 17, 2010, having been filed herewith, the Court being fully apprised, and good cause appearing therefor,

IT IS HEREBY ORDERED as follows:

1. The $1,000.00 currently owed by plaintiffs to defendants Vance, assessed against them by Judge John Stegner pursuant to the remediation agreement, and the $748.42 in attorney fees awarded to plaintiffs against defendants Vances' attorney, W. Jeremy Carr, in relation to Plaintiffs' Motion for Judgment on the Pleadings and for an Order to Dismiss the Counterclaim of Defendants Vance With Prejudice shall be offset by plaintiffs paying to defendants Vance the amount of $251.58.

2. Payment of the $251.58 by plaintiffs to defendants Vance constitutes a full and final resolution of the pending interlocutory assessments imposed.

DATED this 19 day of November, 2010.

JOHN BRADBURY, DISTRICT JUDGE

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22 day of November, 2010, a copy of the foregoing ORDER was served by the method indicated below and addressed to the following:

Theodore O. Creason	____	FIRST-CLASS MAIL
Creason, Moore, Dokken	✓	HAND DELIVERED
& Geidl, PLLC	____	OVERNIGHT MAIL
1219 Idaho Street	____	FAX TRANSMISSION
P.O. Drawer 835		746-2231
Lewiston, ID 83501		
Edwin L. Litteneker	____	FIRST-CLASS MAIL
Attorney at Law	✓	HAND DELIVERED
P. O. Box 321	____	OVERNIGHT MAIL
322 Main Street	____	FAX TRANSMISSION
Lewiston, ID 83501		798-8387
W. Jeremy Carr	____	FIRST-CLASS MAIL
Clark and Feeney	✓	HAND DELIVERED
1229 Main Street	____	OVERNIGHT MAIL
P. O. Drawer 285	____	FAX TRANSMISSION
Lewiston, ID 83501		746-9160

CLERK, DISTRICT COURT

By _____ Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY EX-OFFICIO AUDITOR AND RECORDER STATE OF IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

JOHN M. HOCH and CAROL HOCH, husband and wife, Plaintiffs, v. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	CASE NO. CV08-02272 OPINION AND ORDER ON DEFENDANTS' MOTION FOR LEAVE TO AMEND ANSWER AND COUNTERCLAIM

This matter is before the Court on Defendant's Motion for Leave to Amend Answer and Counterclaim. Plaintiffs Hoch were represented by attorney Theodore O. Creason. Defendants Sweet were represented by attorney Edwin L. Litteneker. Defendants Vance were represented by attorney W. Jeremy Carr. The Court, having read the motion, briefs, and affidavits submitted by the parties, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

FACTUAL AND PROCEDURAL BACKGROUND

On October 21, 2008, Plaintiffs John and Carole Hoch filed the above-entitled action seeking to enjoin Defendants Sweet and Vance from obstructing and blocking Plaintiffs' use of a road easement Plaintiffs contend they received within the deed to their property. Defendants Sweet filed an Answer denying Plaintiffs Hoch hold any property interest in Sweets' property, in particular denying Hochs hold a right of easement over Sweets' property. Defendants Vance filed an Answer and Courterclaim, asserting by way of Answer that Plaintiffs have no easement right upon Defendant Vances' property and by way of Counterclaim that the Court should declare the survey contracted for by Defendants Vance to be the true boundary between Plaintiffs' property and Defendant Vances' property and asserting a claim for trespass. However, early in the litigation, Plaintiffs Hoch and Defendants Vance resolved the issues relative to Vances' counterclaims and the parties stipulated to dismissal of the counterclaims with prejudice.

Approximately one year after the filing of the above-entitled lawsuit, Plaintiffs Hoch filed a Motion for Summary Judgment. Following a hearing on the Motion, the Court granted Plaintiffs summary judgment, finding the warranty deed for the property purchased by the Hochs provided them an easement right in what the parties refer to as the upper road but leaving for later determination the scope and location of the easement road. Plaintiffs subsequently sought to amend their Complaint to include claims for nuisance, trespass, breach of covenant, and assault, which the Court granted. Defendants Sweet filed an Answer and Counterclaims for declaratory judgment as to boundary lines, trespass and breach of restrictive covenants in response to Plaintiffs' Amended Complaint. Defendants Vance also filed an Answer and Counterclaims for declaratory judgment as to boundary lines, trespass and breach of restrictive

covenants in response to Plaintiffs' Amended Complaint. Plaintiffs subsequently filed Answers to the Counterclaims filed by Defendants Sweet and Vance and sought dismissal of the Counterclaims of Defendants Vance based on the stipulated dismissal with prejudice of the Vances' counterclaims plead earlier in the litigation. Following a hearing on the issues, the Court dismissed the Vances' second claim for declaratory judgment and part of the Vances' breach of restrictive covenants claim but let the Vances' trespass claim stand.

On July 12, 2011, Defendants Sweet filed a Motion for Leave to Amend Answer and Counterclaim. Defendants Vance filed notice of non-opposition. However, Plaintiffs Hoch have filed a brief in opposition, assert the Motion is untimely, will result in delay and seeks to raise issues already decided in the Court's ruling on Motion for Summary Judgment.

ANALYSIS

Defendants Sweet seek to amend their Answer and Counterclaims to add a claim for declaratory judgment, asking the Court to find that I.C. § 55-313 allows the Sweets to unilaterally relocate the road that is Plaintiffs' easement. Idaho Code § 55-313 reads:

> Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.

In a recent Idaho Supreme Court ruling, the Court held that "the clear implication of I.C. § 55-313 is to allow for the relocation of an access road where such relocation does not injure interested parties – even where that road takes the form of an express easement – without the consent of the dominant estate holder(s)." *Statewide Construction, Inc. v. Pietri*, 150 Idaho 423,

429, 247 P.3d 650, 656 (2011). The Court's recent ruling is significant to the issue raised by Defendants Sweet on Motion to Amend.

In the instant matter, Judge Bradbury ruled that the warranty deed held by Plaintiffs Hoch provides them an easement for ingress and egress across the 'upper road' running upon Defendants Sweets' property. However, a number of issues remain to be determined in the litigation, including the location and scope of the easement road. The Court's ruling in *Statewide Construction, Inc. v. Pietri* and Defendant Sweets' notice of their intent to invoke rights they have under I.C. § 55-313 may have significant impact on the final outcome in the litigation. Therefore, in the interest of judicial economy and the economic interests of the parties, the Court finds the application of I.C. § 55-313 should be determined concurrent with the remaining matters in the litigation rather than in a separate action, as could occur.

ORDER

The Court hereby GRANTS Defendant Sweets' Motion for Leave to Amend Answer and Counterclaim.

Dated this 10 day of August 2011.

JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing OPINION AND ORDER ON MOTION TO AMEND ANSWER AND COUNTERCLAIM was:

_____ hand delivered via court basket, or

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 11 day of August 2011, to:

Edwin L Litteneker
P.O. Box 321
Lewiston, ID, 83501

William Jeremy Carr
P.O. Drawer 285
Lewiston, ID, 83501

Theodore O Creason
P.O. Drawer 835
Lewiston, ID, 83501

PATTY O. WEEKS, CLERK

By: _____
Deputy

Edwin L. Litteneker
Attorney at Law
Post Office Box 321
322 Main Street
Lewiston, Idaho 83501
Telephone: (208) 746-0344
Facsimile: (208) 798-8387
ISB No. 2297

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs, v. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	Case No. CV 08-2272 **AMENDED ANSWER TO AMENDED COMPLAINT & COUNTERCLAIM**

COME NOW Defendants, Jake Sweet and Audrey Sweet, wife and husband, by and through their attorney of record, Edwin L. Litteneker and answers the Plaintiff's Amended Complaint and Counterclaims against the Plaintiff's as follows:

1. Defendants, Jake Sweet and Audrey Sweet admit paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 11, 13, 14, 25 and 26 of Plaintiffs' Amended Complaint.

2. Defendants, Jake Sweet and Audrey Sweet deny paragraphs 8, 10, 12, 16, 17, 18 19- 45 of Plaintiffs Amended Complaint.

FIRST AFFIRMATIVE DEFENSE

The Plaintiffs have failed to state a claim.

SECOND AFFIRMATIVE DEFENSE

The Plaintiffs should be estopped from claiming any interest in the property of the Defendants Sweet.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff's have proceeded in this matter with unclean hands and are not entitled to the equitable remedy sought herein.

FOURTH AFFIRMATIVE DEFENSE

The Plaintiffs' have failed to name indispensable parties.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiffs' claim is frivolous.

The Defendants Sweets reserve the right to add parties, claims, or defenses based upon discovery in this matter.

COUNTERCLAIM

As counterclaim against the Plaintiffs the Defendants, Jake Sweet and Audrey Sweet do complain and allege as follows:

1. Parties.

1.1 Plaintiffs John M. Hoch and Carole D. Hoch are husband and wife.

1.2 Defendants Jake Sweet and Audrey Sweet are husband and wife.

1.3 Plaintiffs John M. Hoch and Carole D. Hoch are owners of certain real property situate in the County of Nez Perce, State of Idaho more particularly described as follows:

The West half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official records of Nez Perce County,

Idaho.

1.4 Defendants Jake Sweet and Audrey Sweet are owners of certain real property situate in the County of Nez Perce, State of Idaho more particularly described as follows:

> The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

2. Factual Allegations.

2.1 Sweet has constructed at their sole expense a roadway commencing at Stage Coach Road and proceeding in a Southeasterly direction, then east which ends at their residence.

2.2 Such roadway was constructed at Sweet's sole expense and provision of labor, contracted labor and the purchase of materials necessary to build the roadway.

2.3 Such roadway did not exist prior to Sweet's construction of the roadway.

2.4 Such roadway was constructed to service Sweet's residence in a manner convenient to Sweet's use of their property and the location of Sweet's residence. It was not intended by Sweet's to serve Hoch's residence or to be used by Hoch to access Hoch's property.

2.5 Hoch has constructed a residence on the real property owned by them. In connection with the construction of the home, excavation occurred which resulted in excess excavation material from Hoch's excavation being deposited on Sweet's property.

3. Trepass.

3.1 Defendants Jake Sweet and Audrey Sweet reallege all foregoing allegations.

3.2 In approximately July of 2004 without permission from the Sweet's, Hoch, their agents or employees deposited rock on the Sweet's property.

3.3 Such rock remains located on the Sweet property without Sweet's permission and is a continuing trespass.

3.4 Such rock continues to affect the use of the Sweet property.

3.5 Sweet is damaged by the rock being deposited on Sweet's property by Hoch.

4. Unjust Enrichment.

4.1 Defendants Jake Sweet and Audrey Sweet reallege all foregoing allegations.

4.2 If such roadway is determined to be real property within which Hoch has an interest, the real property of sweet was improved to its present condition without any contribution, participation or expense by Hoch.

4.3 Should Hoch be entitled to use such improvements as constructed by Sweet, Hoch and Hoch's real property interest are unjustly enriched by the actions of Sweet.

4.4 Hoch should compensate Sweet in an amount to be determined by the Court based upon the expenses, costs, labor and materials incurred by Sweet to improve the real property interest of Hoch.

5. Declaratory Judgment.

5.1. The Court shall declare that the route for Hoch's access to their residence should be as generally illustrated in the attached Exhibit A.

5.2 Such declaratory relief is not otherwise available to the Sweet's and no remedy at law is available.

5.3 Such location of Hoch's "access road" will provide adequate and appropriate access to Hoch's property across Sweet's property.

6. Attorney Fees. The Defendants, Jake and Audrey Sweet have engaged the services of the undersigned in the defense and pursuant of this matter and have incurred attorney fees and costs. Such fees and costs should be paid by the Plaintiff pursuant to Idaho Code § 12-120, Idaho Code § 12-121, Idaho Code § 45-612, and I.C. § 6-202.

WHEREFORE Defendants, Jake Sweet and Audrey Sweet pray for relief as follows:

1. That the Plaintiffs' Complaint be dismissed with prejudice as it relates to the Defendants, Jake Sweet and Audrey Sweet.
2. That the Court deny any injunction or restraint of Jake Sweet and Audrey Sweets' future actions.
3. That Hoch be required to remove such rock placed on Sweet's property without permission by Hoch.
4. That Sweet receive damages for Hoch's trespass and unjust enrichment as the Court may determine appropriate.
5. That the Hoch's access road and corresponding easement be established as is illustrated in Exhibit A.
6. An award of attorney fees and costs to the Defendants, Jake Sweet and Audrey Sweet.
7. For other such relief as the Court deems just and equitable.

DATED this 18 day of August, 2011.

Edwin L. Litteneker
Attorney at Law

STATE OF IDAHO)
)
County of Nez Perce)

Jake Sweet and Audrey Sweet being first duly sworn upon oath deposes and states as follows:

We are one of the about named defendants named herein. We have read the foregoing document and know the contents thereof and the facts stated therein are true to the best of our knowledge.

Jake Sweet

Audrey Sweet

SUBSCRIBED AND SWORN to before me a Notary Public on this 17 day of August 2011.

HALEY J. GIBSON NOTARY PUBLIC STATE OF IDAHO

NOTARY PUBLIC in and for the State of Idaho.
Residing at Lewiston
My Comm. Exp March 31, 2015

I DO HEREBY CERTIFY that a true and correct copy of the foregoing document was:

/ mailed by regular first class mail, and deposited in the United States Post Office

_____ sent by facsimile

_____ sent by Federal Express, overnight delivery

_____ hand delivered

To: Theodore O. Creason
Creason, Moore, Dokken & Geidl, PLLC
P.O. Drawer 835
Lewiston, ID 83501

W. Jeremy Carr
Clark & Feeney
P.O. Box 285
Lewiston, ID 83501

on this 18 day of August 2011.

Edwin L. Litteneker

EXHIBIT
A 384

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

JOHN M. HOCH and CAROL HOCH, husband and wife, Plaintiffs, v. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants.	CASE NO. CV08-02272 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter came before the Court for trial on December 12, 13, and 14, 2011. Plaintiffs Hoch were represented by attorneys Theodore O. Creason and Samuel T. Creason. Defendants Sweet were represented by attorney Edwin L. Litteneker. Defendants Vance were represented by attorney W. Jeremy Carr. The Court, having considered the record in this matter, the testimony presented, the arguments and exhibits submitted by the parties, the applicable law, and being fully advised in the matter, hereby renders its Finding of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

On October 21, 2008, Plaintiffs Hoch filed a Verified Complaint to Enjoin Defendants from Obstructing Easement after disputes arose between Plaintiffs Hoch and Defendants Sweets and Vances regarding road usage and easements. On October 28, 2008, Defendants Vance filed an Answer and Counterclaim along with a *Lis Pendens* filing against Plaintiff's property. On March 30, 2009, Defendants Sweet filed an Answer. On July 2, 2009, the parties entered into a mediation which resulted in a resolution being reached as to Defendant Vance's counterclaim, but did not result in a full resolution of the easement dispute.

On October 21, 2009, Plaintiffs Hoch filed a Motion for Summary Judgment. The Motion was heard by District Judge John Bradbury, who is now retired. On December 23, 2009, Judge Bradbury entered his Memorandum Decision and Order, wherein he found: (a) Jack Cridlebaugh was the owner of ninety (90) acres of land in the Waha area; (b) Cridlebaugh sold twenty (20) acres to the Vances in 2000, forty (40) acres to the Sweets in 2001, and twenty (20) acres to the Hochs in 2002; and (c) Cridlebaugh retained ten (10) acres of the ninety acre parcel. Judge Bradbury then found language in the relevant deeds contained unambiguous language that granted an appurtenant easement on the "upper road" to Hochs and Sweets. Judge Bradbury, while granting the Hochs' Motion for Summary Judgment regarding conveyance of an easement to Hochs, specifically noted his ruling did not address the precise "route or scope" of the Hoch easement.[1]

Following the Court's grant of Plaintiffs' Motion for Summary Judgment, the Hochs sought, and the Court granted, leave to amend their Complaint. Plaintiffs' Amended Complaint,

[1] Judge Bradbury's decision referenced the language in the Hoch warranty deed that conveyed Cridlebaugh's reservation of easement upon all existing roads and is, therefore, part of the determination to be made in determining the "route and scope" of the Hoch easement rights pursuant to their warranty deed.

filed June 23, 2010, asserts claims for: (I) Nuisance; (II) Trespass; (III) Breach of Covenant; and (IV) Assault. On July 29, 2010, Defendants Vance filed an Amended Answer and Counterclaims, asserting counterclaims for: (A) Declaratory Judgment[2]; (B) Trespass; and (C) Breach of Restrictive Covenants. On August 4, 2010, Defendants Sweet filed an Amended Answer and Counterclaims, asserting counterclaims for: (A) Trespass; (B) Unjust Enrichment; and (C) Declaratory Judgment. Each of the parties seeks attorney's fees in their pleadings. On July 12, 2011, Defendants Sweet moved to amend their Amended Answer and Counterclaims to add a claim for Declaratory Judgment, which was granted by the Court on August 10, 2011. Defendants Sweet Declaratory Judgment claim seeks the right to move the upper road easement pursuant to I.C. § 55-313.

At trial, the Court heard from a number of witnesses, including Plaintiff John Hoch and Defendants Rob Vance, Audrey Sweet and Jake Sweet. The parties, understanding the Court's earlier ruling that found the deed from Jack Cridlebaugh to Plaintiffs Hoch granted Plaintiffs easement upon what the parties describe as the "upper road", nevertheless dispute the scope and location of the upper road. At issue for this Court to determine is what constitutes a road and where upon the property the "upper road" existed at the time Cridlebaugh reserved and conveyed the appurtenant easement rights at issue. In discussing the roads at issue, the parties used the terms "upper road" and "lower road". There is no issue before the Court as to the "lower road" as defined by the parties. However, at issue for determination is the route or location of the "upper road" as that term is used by the parties.

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[2] On Motion of Plaintiff, on October 25, 2010 Judge Bradbury dismissed Defendant Vances' counterclaim for Declaratory Judgment and Breach of Restrictive Covenants only as to the claim that construction had taken more than one year, but not as to construction debris left on the Vances' property.

In deposition[3], Jack Cridlebaugh testified that when he sold property to the Vances, he gave them an easement right on the lower road only.[4] When he sold to Sweets, he originally planned to give them easement rights on the lower road only but, after discussing the matter with them, decided to give them easement rights on both the lower and upper roads.[5] Cridlebaugh further testified that when he sold property to the Hochs, his intent was to give them easement rights on the lower road only, as he had assured the Sweets he would not give anyone easement rights over the upper road without their approval.[6]

Defendant Rob Vance testified that when he purchased his property from Jack Cridlebaugh in 2000, he was given easement rights on the "lower road" only. However, wanting a shorter access route to his property, Defendant Vance contacted adjacent landowner McKenna to discuss obtaining easement rights across his property via what is commonly referred to as Buckboard Lane. Defendant Vance testified Buckboard Lane was not part of the lower or upper Cridlebaugh road, but rather was barely more than a trail that ran in an east/west direction on the Vance and McKenna properties. After Vance obtained easement rights from McKenna, in 2002 or 2003 he hired Willis Humphreys to build the road now known as Buckboard Lane, which runs east/west across the Vance and McKenna properties and connects at the east end with Stagecoach Road[7] and ends at the west end on the Vance property.

Plaintiff John Hoch testified that in 2002, when he viewed the property he subsequently purchased, Cridlebaugh took him there by way of the lower road. When Plaintiff purchased the

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[3] Exhibit 3 to Defendants' Jake & Audrey Sweet's Reply Memorandum to Plaintiffs' Motion for Summary Judgment and as attached to the Memorandum in Opposition to Motion for Summary Judgment filed by Defendants Vance on November 23, 2009.
[4] Cridlebaugh Depo. Tr. at p 30.
[5] Cridlebaugh Depo. Tr. at pp 24-25.
[6] Cridlebaugh Depo. Tr. at pp 25-32.
[7] Stagecoach Road is a county public road. However, Buckboard Lane, Black Bear Bend, and the roads referred to as the upper road and lower road are private roads.

property, it was his understanding that Cridlebaugh would only convey easement rights on the lower road. In 2005 Plaintiff Hoch spoke to Defendants Sweet about using the upper road to access his property, as it was a better route for construction crews who would be building a log home on the property. The Sweets agreed to Hoch's use of the upper road, at least through the construction phase of Hoch's home. However, by 2008, the Sweets informed Plaintiffs they could no longer use the upper road and, on several occasions, work crews attempting to get to the Hoch property by way of the upper road found their passage impeded because rocks, snow or equipment had been placed in the road. By this time, Hoch believed his deed included easement rights on both the lower and upper road and, when he was unable to reach an understanding with the Defendants, filed suit to resolve the easement dispute. The Court subsequently determined by the Court that Plaintiff Hoch had received easement rights in the upper road, but the ruling left for later determination a definition of the route and scope of the road.

In addition to the testimony of witnesses at trial, the record contains the deposition transcript of Jack Cridlebaugh taken on April 15, 2009 and made part of the record on November 19, 2009[8]. In addition to the undisputed easement right Plaintiffs have on the lower road, Plaintiffs also claim their deed provides them easement rights on the upper road and on the section of Buckboard Lane that currently exists on the property of Defendants' Vance.[9] The Court, in its summary judgment ruling, determined Plaintiffs deed conveyed ingress/egress easement rights on the upper road and also conveyed "an easement over and across all roadways presently existing on the property herein being conveyed"[10] but left for later determination

[8] Exhibit 3 to Defendants' Jake & Audrey Sweet's Reply Memorandum to Plaintiffs' Motion for Summary Judgment and as attached to the Memorandum in Opposition to Motion for Summary Judgment filed by Defendants Vance on November 23, 2009.
[9] Plaintiffs' theory is that the portion of Buckboard Lane that is on the Vance property was an extension or the upper road.
[10] Plaintiffs' Exhibit 105 and 106.

whether the road now known as Buckboard Lane was a road "presently existing" at the time Cridlebaugh conveyed to Vances the property they now own.[11] The testimony of Jack Cridlebaugh in his deposition is critical to the analysis of this issue. If the portion of Buckboard Lane that currently exists on the Vance property was a "roadway" at the time Cridlebaugh conveyed his property to the Vances, then it would fall within the reserved easement language in the Vance deed that was incorporated into the Hoch deed. If it was not a "roadway" at the time of conveyance to Vances, then Cridlebaugh had no easement reservation that would have transferred to Hochs.

While the road easement issue is the primary issue in dispute, the parties have asserted a number of other claims and counterclaims. In support of those claims, the parties presented the Court with a number of photographs in support of their testimony regarding the various additional claims and counterclaims. Included among the photographs are pictures showing equipment, cattle guards, gates, and rock berms in the roadway. There are also pictures of construction debris, brush piles and a proposed new road. Each of the deeds received by the parties contains the same covenants and restrictions. At issue are the following covenants and restrictions: (a) each parcel shall be kept in a clean and attractive manner; (b) outbuildings, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel; (c) no fences shall be built on the roads or rights-of-way; (d) no noxious, illegal or offensive activity, nor any activity that may become a nuisance to the neighborhood or may materially interfere with the quiet enjoyment of each respective parcel owner; (e) the exterior of any structure, residence or outbuildings shall be completed within one year of obtaining proper building permits; and (f) during the period of construction, the owner is

[11] Plaintiffs' Exhibit 107 at ¶¶ 5 and 6.

to keep the premises free and clear of debris and waste matter, disposing such in a manner that imposes no interference or detraction to adjoining property.[12]

CONCLUSIONS OF LAW

(A) ROUTE AND SCOPE OF "UPPER ROAD"

As previously stated, the Court has already determined that Plaintiffs Hoch have an easement right for ingress and egress on the "upper road" by way of conveyance in the warranty deed from Jack Cridlebaugh to the Hochs.[13] However, the Court left for later determination the route and scope of the "upper road". The evidence as to the route of the upper road is relatively undisputed. Jack Cridlebaugh testified in deposition that sometime in the late 90's he purchased ninety (90) acres in rural Nez Perce County in the area commonly known as Waha.[14] Cridlebaugh stated that when he purchased the property there were two access roads, "the lower one off of Stagecoach and the upper one off of Stagecoach."[15] Cridlebaugh then described the route of the "upper road" as leaving Stagecoach Road and going across the Carpenter property, then onto the Weinert property, then onto the ten acres still owned by Cridlebaugh, then across what is now the Sweet property, then onto what is now the Hoch property, where it tied into the lower road.[16] The upper road as described by Cridlebaugh, i.e. from Stagecoach Road to the Hoch property, was subsequently designated by Nez Perce County as Black Bear Bend.[17] Cridlebaugh further testified that the lower road was primarily a four-wheeler trail when he

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[12] Plaintiffs' Exhibits 105, 106, and 107.
[13] The Court found that, despite a contrary intent by Jack Cridlebaugh, the language in the Hoch warranty deed conveyed to Hochs easement rights in both the upper and lower roads.
[14] Cridlebaugh Depo. Tr. at pp 6-7.
[15] Cridlebaugh Depo. Tr. at p 8.
[16] Cridlebaugh Depo. Tr. at pp 9-10.
[17] Plaintiffs' Exhibit 10-1 shows Black Bear Bend as a loop. However, the map appears to either be inaccurate or to have omissions as it does not indicate the location of Buckboard Lane or the road referred to by the parties as the lower road.

purchased the property, but that the upper road was passable by way of pickup truck.[18] However, prior to selling any of the property, Cridlebaugh had work done on the roads. The Sweets further improved the upper road, predominantly following the existing route that had always provided access.

The parties have not disputed the route of the upper road and, therefore, there is little more the Court can add as to route. As for scope, the easement right on the upper road is defined in the Hoch warranty deed as limited to ingress and egress.

(B) THE VANCE PORTION OF BUCKBOARD LANE

In dispute is whether Plaintiffs Hoch received easement rights in that portion of Buckboard Lane that traverses the Vance property. The evidence on this issue is less than clear. Jack Cridlebaugh, when asked to describe the upper road, stated:

> It was just a dirt road. Nobody graveled it or anything. It traveled from, well, from my property through Sweets, and originally the road made a loop before I bought it. It came up Buckboard Lane and crossed in a westerly direction in front of Vances, made a loop out toward the Hochs' property and then went right back up this way, out to my ten acres.

Jack Cridlebaugh Depo. Tr. at p. 19.

Cridlebaugh's description of the upper road, as stated in his deposition at page 19 is, however, in conflict with other of his testimony. In his deposition, Cridlebaugh stated he did not have easement rights on Buckboard Lane. When asked if there were any roadways in place that provided access to the Hoch, Sweet, or Vance properties during the time period of 1997 to 2001, Cridlebaugh stated, "No. The only three accesses were the upper road, this Buckboard Lane and this lower road. *I didn't have access over Buckboard Lane.*"[19] Therefore, at the time Cridlebaugh sold Vances their property, the upper road could not have come up Buckboard Lane

[18] Cridlebaugh Depo. Tr. at p 11.
[19] Cridlebaugh Depo. Tr. at p. 20 [emphasis added].

and made a loop back across Vances', Hochs', and Sweets properties and onto the ten acres currently owned by Cridlebaugh. A careful reading of Cridlebaugh's testimony reveals his statement was that the described loop existed before he bought the property. There is, however, no evidence before the Court that suggests Cridlebaugh, who had no easement right on the portion of Buckboard Lane that currently crosses the McKenna property, maintained or utilized the portion of Buckboard Lane that crosses the Vance property. Therefore, the Court must determine if the Vance portion of Buckboard Lane was a "roadway" at the time Cridlebaugh conveyed his property to the Vances and whether it was considered part of the upper road.

Defendant's Exhibit 200 is a 1998 aerial photo of those portions of the Cridlebaugh ninety acres that were eventually sold to Vance, Sweet, and Hoch. The photo clearly appears to depict what came to be known as Buckboard Lane, showing it from the point it leaves Stagecoach Road, passing across the McKenna property and across the Vance property, onto the Hoch property where it tied into the intersection of the upper and lower roads. Defendant Vance testified he purchased his property from Cridlebaugh in October 2000, approximately two years after the 1998 aerial photo was taken. The only ingress/egress access Vance received was an easement right on the lower road, as Cridlebaugh did not have an easement right on Buckboard Lane where it crosses the McKenna property. After purchasing his property, Vance and McKenna entered into a reciprocal easement agreement that gave Vance easement rights on the McKenna portion of Buckboard Lane.

Vance testified he had walked the area of his property that is now Buckboard Lane before and after purchasing his property and stated it appeared to be an old skidder trail that had ruts in it, indicating it had been traveled at some point. After obtaining easement rights from the

McKennas, Vance testified he hired an individual to build Buckboard Lane so that he would have better access to and from Stagecoach Road.

The Court finds the evidence shows the portion of Buckboard Lane that runs upon the Vance property was an existing road at the time Cridlebaugh conveyed property to the Vances and clearly appears on the 1998 aerial photograph[20] as an extension of the upper road. As a result, it was subject to the reservation of easement rights retained by Cridlebaugh in the Vance Warranty Deed, and was an easement right conveyed to the Hochs by incorporation of that easement right in the Warranty Deed from Cridlebaugh to Hoch. However, the Hochs need to be cognizant of the limits of their easement right on Buckboard Lane. It does not include any portion of Buckboard Lane not on the Vance property. Therefore, it does not convey to Hochs any right in that portion of Buckboard Lane that traverses the McKenna property and does not provide Hochs access to Stagecoach Road by means of Buckboard Lane. The Hochs have no easement right in that portion of Buckboard Lane that runs across the McKenna property. Jack Cridlebaugh at no time had an easement right on the McKenna portion of Buckboard Lane and, therefore, he could not convey to the Hochs that which he did not have.

(C) RELOCATION OF UPPER ROAD PURSUANT TO I.C.§ 55-313

Defendants Sweet seek a declaratory judgment from the Court allowing them to relocate the portion of the upper road that traverses their property. The proposed route of the relocation has been identified and roughed-in on the ground by a bulldozer, but no graveling, drainage, or other improvements have been made to the proposed new road. Idaho Code provides:

> Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but

[20] Plaintiffs' Exhibit #7.

> such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access.

Idaho Code § 55-313.

At trial, the Court heard testimony from Raymond Flowers, a registered Professional Engineer with over fifty-five years of road engineering experience. Mr. Flowers was hired by Plaintiffs Hoch to inspect the proposed new road[21] and then provide a written report[22] regarding his inspection and expert opinion as to the feasibility of the proposed new road. Mr. Flowers testified it was his opinion the proposed road increased the travel distance to the Hoch property by approximately 1900 feet over the current route, the proposed route includes grades of 10% to 15%, the road width will accommodate only a single vehicle and has no turnouts or other means to allow more than one vehicle to travel on the roadway, the road would require significant sloping, berm removal and other drainage features before all-weather access would be possible, and the road surface will be impassable during wet or snowy weather conditions unless considerable amounts of rock and gravel are placed on the roadway. Defendants Sweet offered no expert testimony to dispute the opinion of Mr. Flowers, offering instead their lay opinion that the road is a travelable roadway.

The Court finds the proposed relocation of that section of the upper road that traverses the Sweet property would cause injury to Plaintiffs Hoch. The proposed route nearly triples the distance of the Sweet portion of the road and includes two steep grades of 10% or greater. The increased distance and the steep grades would significantly add to the cost of maintaining the road, would make the road impassable by ordinary vehicles except under the most ideal weather and surface conditions, creates safety risks as it is only wide enough for a single vehicle, and the

[21] Plaintiffs' Exhibits 26 through 26-44 depict the proposed new road.
[22] Plaintiffs' Exhibit 28.

ability to provide year around access is questionable. Therefore, the Court finds Defendant Sweets are enjoined from relocating the portion of roadway at issue to the proposed location.

(D) TRESPASS CLAIMS/COUNTERCLAIMS

After Plaintiffs Hoch rested their case in chief, Defendants Sweet and Vance moved for a directed verdict on Hochs' claims for trespass. The Court took the motion under advisement and now enters its ruling along with an analysis of the counterclaim for trespass asserted by Defendants Vance.

Plaintiffs Hoch alleged Defendants Sweet and Defendants Vance have entered onto Plaintiffs property without permission, thus committing trespass. In particular, Plaintiffs Hoch allege Defendant Audrey Sweet entered onto the Hoch property and aggressively approached John Hoch while waiving papers at him. Defendants Sweet and Vance both assert counterclaims contending Plaintiffs Hoch have entered onto each of their respective properties without permission, thus committing trespass. In particular, Defendants Sweet allege Plaintiffs Hoch, their agents or employees, without the permission of the Sweets, deposited rock onto the Sweet property in July 2004 causing damage to the Sweet property. Defendants Vance assert Plaintiffs Hoch have committed trespass by allowing construction and other types of debris to go onto the Vance property[23].

The Court finds there has been no trespass by the Defendants upon Plaintiffs' property. The Court was presented with no evidence that Plaintiffs have no-trespassing signs marking their property, no evidence that Plaintiffs informed the Defendants they were not allowed onto their property, and presented no evidence Plaintiffs were damaged by the Defendants going onto their

[23] This claim is limited to any trespass that occurred after July 2, 2009. See Memorandum Decision and Order entered by Judge Bradbury on October 25, 2010 regarding claims that survived the mediation agreement between Plaintiffs Hoch and Defendants Vance.

property. To the contrary, the clear evidence is that initially Plaintiffs Hoch and Defendants Sweet and Vance considered each other friends, engaging in social activities together. While the relationships appear to have soured, the Court was presented with no evidence that the relationships had become so hostile that one party had forbidden the other from entering upon their property in order to have a conversation. Therefore, Plaintiffs' claims against the Defendants for trespass are without merit.

Defendants Sweet and Vance both assert trespass claims against Plaintiffs for allowing excavation and construction debris to go upon Defendants' properties. As for Defendants Sweet's claim that Plaintiffs allowed rock debris to be placed on Sweet's property, the Court finds Plaintiffs must remove any rock from the Sweet's property that is there as a result of it being moved from Plaintiffs' property to Defendants Sweet's property during excavation on the Hoch property. This will require Defendants Sweet allow Plaintiffs access to Sweet's property. The same is true of any construction or other debris that Plaintiffs Hoch have allowed to travel onto Defendants Vance's property. Plaintiffs Hoch are responsible for removing all of their debris from the Vance's property. However, this will also require the cooperation of the parties and permission from the Vance's for the Hochs or their agents to go onto the Vance property to complete the task of cleaning up the debris. If Defendants Sweet or Defendants Vance are unable or unwilling to cooperate in the removal of the Hochs' rock and debris from their respective properties, then the Hochs will be relieved of their responsibility to remove the items of trespass.

(E) PLAINTIFFS' ASSAULT CLAIM

Plaintiffs' Amended Complaint asserts Audrey Sweet committed an assault upon John Hoch by aggressively approaching him and making physical threats, causing John Hoch to fear

he was at risk of imminent harm. Plaintiffs, however, presented no evidence Audrey Sweet at any time threatened John Hoch and presented no evidence that John Hoch was fearful on the day Audrey Sweet came to his Waha home to discuss his use of the upper road. Therefore, Plaintiffs' claim for assault must be dismissed.

(F) PLAINTIFFS' NUISANCE CLAIM

Plaintiffs allege Defendants Sweet and Vance interfered with the Hochs reasonable use and comfortable enjoyment of their property by placing barriers in the easement roadway, thus making the road impassable or requiring the Hochs to remove the barriers in order to utilize the easement to reach their property. Plaintiffs Hoch seek relief by way of an injunction, damages, or abatement.

The nuisance claim against Defendants Vance involved efforts by the Vances to block the Hochs' use of Buckboard Lane where it traverses the Vances' property. While the Court found the warranty deed to Plaintiffs Hoch conveyed an easement right upon that portion of Buckboard Lane that traverses the Vance property, the Court also found the easement right upon the Vance portion of Buckboard Lane is limited in scope and does not provide ingress and egress access for the Hochs, as they have no easement right upon that portion of Buckboard Lane that traverses the McKenna property and meets the public roadway known as Stagecoach Road.

The nuisance complained of by the Hochs as against the Vances was enjoined by the Court in June 2010. During trial, Plaintiffs presented no evidence that they were damaged as a result of being prevented from exercising their easement right upon the Vance portion of Buckboard Lane, which does not provide Plaintiffs ingress and egress to their property. Therefore, the appropriate relief is to permanently enjoin Defendants Vance from blocking the roadway in a manner that prevents Plaintiffs from exercising their easement right. However,

contrary to arguments put forth by Plaintiffs at trial, the Court does not find the placement of a gate across any of the roadways upon which Plaintiffs have an easement right to be a barrier or obstruction to Plaintiffs' easement right, so long as Plaintiffs have the ability to pass through any gate.[24] As was stated by Idaho's Court of Appeals, "[L]imiting access to the easement to those with use rights is sensible and benefits both parties". *Boydstun Beach Association v. Allen*, 111 Idaho 370, 378, 723 P.2d 914 (1986). This is especially true in the parties' situation where their homes are in a very rural area used by recreationalists, hunters, and people looking for firewood.

Plaintiffs have also asserted Defendants Sweet and Vance have placed barriers on the upper road in order to prevent the Hochs use of the road. Any impediment to Plaintiffs use of the upper road was enjoined by the Court in June 2010 and Plaintiffs presented no evidence that any such activity has occurred since that time. Nevertheless, Plaintiffs contend Defendants efforts to prevent them from using the upper road have damaged Plaintiffs ability to complete construction on the home, and that it has cost them lost wages in dealing with the problem.

Plaintiffs are seeking a variety of monetary damages. First, Plaintiffs seek damages for thirty months of mortgage payments on their Lewiston home, contending they had to make two mortgage payments for a longer period than anticipated because of construction delays caused by road barriers. The Court finds Plaintiffs' claim for mortgage damages too speculative. Plaintiffs never engaged the services of a real estate agent, never placed their Lewiston home on the market through an agent or by any other method, presented no evidence regarding the marketability of the home or the likelihood of the home selling in the current housing market. Plaintiff John Hoch testified they recently had the Waha home on the market for a short period but had no interested buyers. The Court is also not persuaded that the sole delay in finishing

[24] This will require that all parties with easement rights on a roadway be provided a key or the combination to any lock that is placed on a gate.

construction of Plaintiffs' Waha home was the few incidents of road barriers. Plaintiff John Hoch testified he knew he had easement rights on the lower road and had used the lower road on a number of occasions to access his property. Plaintiffs could have used the lower road for access but chose not to, asserting it was longer and not as good a road. Nevertheless, nothing prevented Plaintiffs from improving and utilizing the lower road in order to move construction of their home forward. Additionally, with the exception of possibly one time, Plaintiffs or their contractors were able to go around or remove the road barriers so as to reach their property. The Defendants have not blocked the roadway since being enjoined from doing so by the Count in June 2009, yet construction of Plaintiffs' Waha home remains unfinished. The evidence does not establish that the construction delays resulted from the actions taken by the Defendants prior to June 2009.

Next, Plaintiffs contend they suffered lost wages when John Hoch had to take time away from work to deal with issues raised by the dispute over road access. However, Plaintiffs presented no evidence supporting the claim, such as the number of appointments cancelled as a direct result of the road issues and the average income per appointment. Rather, Plaintiffs simply offered the Court a speculative number of 1.5 days lost at a value of $1,500.00 per day. The Court finds the claimed damages too speculative and without sufficient evidence to directly relate the loss to road issues.

Plaintiffs also seek damages for the cost of rock placed on the upper road and snow removal costs for the upper and the lower road. The law in Idaho regarding the duty to maintain an easement road is well established.

> The owner of a servient estate has no duty to maintain the easement. *Gibbens v. Weisshaupt,* 98 Idaho 633, 640, 570 P.2d 870, 877 (1977); *Coulsen v. Aberdeen–Springfield Canal Co.,* 47 Idaho 619, 630, 277 P. 542, 546 (1929). The duty of maintaining the easement rests with the easement owner (i.e., dominant estate),

> even when the servient landowner uses the easement. *Sellers v. Powell,* 120 Idaho 250, 251, 815 P.2d 448, 449 (1991). That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate. *Conley,* 133 Idaho at 271, 985 P.2d at 1133; *Gibbens,* 98 Idaho at 640, 570 P.2d at 877; *Rehwalt v. American Falls Reservoir District # 2,* 97 Idaho 634, 636, 550 P.2d 137, 139 (1976); *Pioneer Irr. Dist. v. Smith,* 48 Idaho 734, 738, 285 P. 474, 475 (1930).

Walker v. Boozer, 140 Idaho 451, 455-456, 95 P.3d 69 (2004).

Costs incurred by Plaintiffs to clear snow, repair, and maintain roads on which they hold easements rights are the responsibility of Plaintiffs, not the responsibility of the servient landowners.

(G) DEFENDANTS SWEET COUNTERCLAIM FOR UNJUST ENRICHMENT

Defendants Sweet, who hold an easement right in the upper road, have made substantial improvements to the road from the point it enters the Sweet property to where it accesses their home. Defendants Sweet now argue that if Plaintiffs Hoch are found to have an easement right on the upper road, they will be unjustly enriched by the improvements made by the Sweets at their expense on the portion of the road that traverses the Sweet property. Defendants Sweet correctly note that Plaintiffs Hoch will benefit from the improvements made by the Sweets. However, the law does not support Defendants claim for unjust enrichment.

> When a servient estate owner seeks contribution they must show the dominant estate owner's maintenance created an additional burden or an interference that would damage the servient estate. *Id.*
>
> [A]bsent a showing that the easement owners maintenance' of the easement created an additional burden or interference with the servient estate, the servient estate cannot dictate the standard by which the easement should be maintained, expend funds to maintain it to the level desired by the servient estate and then seek reimbursement for those expenditures and contribution for future expenditures from the easement owners.

Beckstead v. Price, 146 Idaho 57, 66, 190 P.3d 876 (2008).

Defendants Sweet presented the Court with no evidence showing the improvements they made to the upper road were the result of Plaintiffs' easement right creating an additional burden or an interference that would damage the servient estate. Nor is it likely Defendants Sweet could have made such a showing as the improvements they made to the road were done prior to the Court ruling Plaintiffs Hoch hold an easement right in the upper road.

(H) BREACH OF RESTRICTIVE COVENANTS

Plaintiffs Hoch assert Defendants Vance[25] have breached certain of the covenants that are part of each of the parties' warranty deeds by failing to maintain their property in a clean and attractive manner and by acting in a manner that has been noxious, illegal or offensive so as to interfere with Plaintiffs' quiet enjoyment of their property. The warranty deeds conveying property to the Vances, Sweets and Hochs contain the following pertinent restrictive covenants:

1. No noxious, illegal or offensive activity shall be carried on upon any parcel, nor shall anything be done thereon which may be or may become a nuisance to the neighborhood or in any way materially interfere with the quiet enjoyment of each of the respective parcel owners.

2. Each parcel shall be kept in a clean and attractive manner.

3. Outbuildings, such as barns, shops or free-standing garages, shall be similar in design to and compliment the structure constructed on the parcel.

Plaintiffs contend Defendants Vance have violated the above portions of the restrictive covenants by placing a brush pile and equipment on the Vance property within view of the Hoch home and by failing to tear down an old shed that is visible from the Hoch property. Defendant Vance testified the shed at issue was on the property when he purchased it, that the brush pile

[25] Defendant Vances' claim is limited to any breach that occurred after the mediation agreement entered into by the parties on July 2, 2010. See Judge Bradbury's Memorandum Decision and Order entered October 25, 2010.

was the result of fire mitigation work being done in agreement with Nez Perce County[26] and that he parks his equipment in the area as it is the only area on his property that is sufficiently flat for such a purpose. Plaintiff Hoch in his testimony acknowledged the old shed was on the Vance property prior to the Vances' purchase of the property and that the brush pile was burned once weather conditions allowed. The Court does not find Defendants Vance in breach of the restrictive covenants. Efforts to mitigate potential fire hazards are a benefit, not only to the Vances, but also to those living in the area. The Court is also not persuaded that parking equipment on one of the few flat areas of the Vances property violates the restrictive covenants, nor does leaving a prior structure in place.

Finally, the Vances also assert a claim against Plaintiffs Hoch for violations of the restrictive covenants by allowing litter and construction debris to accumulate on the Hoch property. While the term "clean and attractive" as used in the restrictive covenants is vague, it is also relative to the surrounding area. The Court cannot characterize the condition of the area around the under-construction Hoch home as clean and attractive. However, the unkempt but presumably temporary condition appears to damage only the Hochs, as the debris is not visible from the Vance home or from the majority of the Vance property, but is clearly visible to any potential buyer viewing the Hoch property. Therefore, while the present condition around the Hoch home appears to violate the "clean and attractive" language in the restrictive covenants, there is no evidence the Vances have been damaged by the condition.

[26] Defendants Exhibit #204.

(I) ATTORNEY FEES AND COSTS

Each party in his pleadings seeks an award of attorney fees and costs. The Court finds each party shall be responsible for his own attorney fees and costs, as each of the parties asserted meritorious claims and each prevailed in part.

ORDER

The route and scope of the upper road is as the roadway currently exists from the point that it departs Stagecoach Road to the point that it reaches the Hoch property.

The warranty deed from Cridlebaugh to Hochs conveyed an easement right on that portion of Buckboard Lane that traverses the Vance property, but is limited to that portion of the roadway and does not extend beyond the Vance property onto that portion that traverses the McKenna property.

Defendants Sweet's request for a declaratory judgment allowing them to move that portion of the upper road that traverses their property is denied.

Plaintiffs' claims for trespass against Defendants Sweet and Defendants Vance are dismissed.

Plaintiffs are ordered to remove the excavation rock that was taken from Plaintiffs' property and deposited upon Defendants Sweet's property if they can obtain the cooperation of Defendants Sweet.

Plaintiffs are ordered to remove the construction and other debris that has traveled from Plaintiffs' property onto Defendants Vance's property if they can obtain the cooperation of Defendants Vance.

Plaintiffs' claim for assault against Defendants Sweets is hereby dismissed.

Defendants Sweet and Defendants Vance are hereby permanently enjoined from preventing, or attempting to prevent, Plaintiffs exercise of their easement rights upon the upper road and upon that portion of Buckboard Lane that traverses the Vance property.

Defendants Sweet's counterclaim for unjust enrichment is hereby dismissed.

Plaintiffs claim for breach of covenants against Defendants Vance is hereby dismissed.

Defendants Vance are hereby ordered to remove their *lis pendens* filing against Plaintiffs Hoch's property.

Defendants Vance's claim against Plaintiffs for breach of covenants is hereby dismissed.

Each parties' claim for attorney fees and costs is hereby denied.

Dated this 9 day of February 2012.

JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER was:

__✓__ hand delivered via court basket, or Messenger Service

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 10th day of February, 2012, to:

Theodore O. Creason
Samuel T. Creason
PO Drawer 835
Lewiston, ID 83501

W. Jeremy Carr
PO Drawer 285
Lewiston, ID 83501

Edwin L. Litteneker
PO Box 321
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT • SECOND JUDICIAL DISTRICT • NEZ PERCE COUNTY • STATE OF IDAHO
EX-OFFICIO AUDITOR AND RECORDER

406

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Attorneys for Defendants/Appellants,
Rob and Becky Vance

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs/Respondents, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants/Appellants.	**Case No. CV 2008-02272** **NOTICE OF APPEAL** Fee Category: L Fee Amount: $101.00

TO: THE ABOVE NAMED RESPONDENTS, JOHN M. HOCH and CAROLE D. HOCH, HUSBAND AND WIFE, AND THEIR ATTORNEY, THEADORE O. CREASON, 1219 Idaho Street, P.O. Drawer 835, Lewiston, Idaho 83501;

AND TO: THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, ROB VANCE and BECKY VANCE, husband and wife, appeal against the above-named Respondents, JOHN M. HOCH and CAROLE D. HOCH, husband and wife, to the Idaho Supreme Court from the *Memorandum Decision and Order* entered

in the above entitled action on December 23, 2009, by the Honorable John Bradbury, and the *Findings of Fact, Conclusions of Law, and Order* entered in the above entitled action on February 9, 2012, by the Honorable Judge Jeff M. Brudie, presiding.

2. The party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of the issues on appeal which the Appellants intend to assert in the appeal include the following:

(a) Did the District Court error in granting Respondents' motion for summary judgment?

(b) Did the District Court error in determining that "Buckboard Lane" was an "existing roadway" at the time Jack Cridlebaugh conveyed his property to the Appellants?

(c) Did the District Court error in denying Appellants' motion in limine?

(d) Did the District Court error in admitting Jack Cridlebaugh's deposition into evidence?

4. There has been no order entered sealing all or any portion of the record.

5. (a) A reporter's transcript is requested.

(b) The Appellants request the preparation of the reporter's standard transcript as defined in Rule 25(c) I.A.R. of the trial held on December 12, 13, and 14, 2011 in both hard copy and electronic format.

6. The Appellants request the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:

Date	Document
10/21/2009	Plf's Motion for Summary Judgment

10/21/2009 Memorandum in Support of Plf's Motion for Summary Judgment

11/19/2009 Affidavit of Jake Sweet

11/19/2009 Def's Jake and Audrey Sweet's Reply Memorandum to Plf's Motion for Summary Judgment

11/23/2009 Def's Memorandum in Opposition to Motion for Summary Judgment

11/23/2009 Affidavit of Becky Vance in Support of Memo in Opposition to Motion for Summary Judgment

11/25/2009 Plf's Motion to Exclude Objectionable Testimony Submitted by the Affidavits of Jake Sweet and Becky Vance

11/25/2009 Plf's Reply to Def's Jake and Autrey Sweet's Reply Memo to Plf's Motion for Summary Judgment and Defs' Vance's Memo in Opposition to Motion for Summary Judgment

12/14/2011 Exhibit 109, Transcript of Preliminary Hearing

12/14/2011 Exhibit 108, Deposition of Jack Cridlebaugh

7. The Appellants request the following documents, charges, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: **All exhibits admitted into evidence.**

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address:

Linda Carlton
Nez Perce County Courthouse
P.O. Box 896
Lewiston, Idaho 83501

(b) That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript.

LAW OFFICES OF
CLARK AND FEENEY, LLP
LEWISTON, IDAHO 83501

(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 19th day of March, 2012.

CLARK and FEENEY

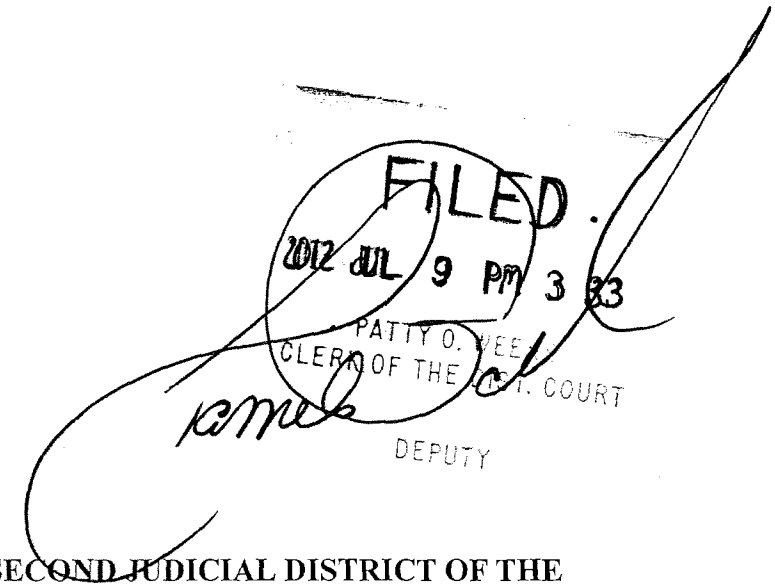
By: _____
W. Jeremy Carr, a member of the firm.
Attorneys for Defendants/Appellants
Rob and Becky Vance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of March, 2012, I caused to be served a true and correct copy of the foregoing document, by the following:

Theodore O. Creason Creason, Moore, Dokken & McIntosh 1219 Idaho Street PO Drawer 835 Lewiston, ID 83501	☐ U.S. Mail ☑ Hand Delivered ☐ Overnight Mail ☐ Telecopy
Edwin L. Litteneker Attorney at Law PO Box 321 322 Main St. Lewiston, ID 83501	☐ U.S. Mail ☑ Hand Delivered ☐ Overnight Mail ☐ Telecopy
Linda Carlton Court Reporter PO Box 896 Lewiston, ID 83501	☐ U.S. Mail ☑ Hand Delivered ☐ Overnight Mail ☐ Telecopy

By: _____
W. Jeremy Carr, Attorneys for Defendants/Appellants
Rob and Becky Vance



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROL HOCH, husband and wife,	CASE NO. CV08-02272
Plaintiffs,	FINAL JUDGMENT
v.	
JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife,	
Defendants.	

The above matter came before the Court for trial on December 12, 13, and 14, 2011. Plaintiffs Hoch were represented by attorneys Theodore O. Creason and Samuel T. Creason. Defendants Sweet were represented by attorney Edwin L. Litteneker. Defendants Vance were represented by attorney W. Jeremy Carr. The Court entered its Findings of Fact, Conclusions of Law, and Order on February 9, 2012.

Plaintiffs John and Carole Hoch are the owners of real property located in Nez Perce County, to-wit: The West half of the Northeast Quarter of the Northwest Quarter of Section 22,

Plaintiffs John and Carole Hoch are the owners of real property located in Nez Perce County, to-wit: The West half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

Defendants Jake and Audrey Sweet are the owners of real property located in Nez Perce County, to-wit: The Southeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

Defendants Rob and Becky Vance are the owners of real property located in Nez Perce County, to-wit: The East Half of the Northeast Quarter of the Northwest Quarter of Section 22, Township 33 North, Range 4 West of the Boise Meridian, Official Records of Nez Perce County, Idaho.

THEREFORE, IT IS THE JUDGMENT OF THE COURT THAT:

(1) The route and scope of the road commonly referred to as the 'upper road' is as the roadway currently exists from the point that it departs Stagecoach Road to the point that it reaches the Hoch property.

(2) Plaintiffs John M. Hoch and Carole D. Hoch, by way of the warranty deed from Criddlebaugh to Hoch, hold an easement for ingress and egress over the road commonly known as the 'upper road', which crosses over a portion of the real property owned by Defendants Jake Sweet and Audrey Sweet and a portion of the real property owned by Rob Vance and Becky Vance.

(3) Plaintiffs John M. Hoch and Carole D. Hoch, by way of the warranty deed from Criddlebaugh to Hoch, hold an easement over a portion of Buckboard

Lane, the easement being only upon that portion of Buckboard Lane that traverses the real property owned by Rob Vance and Becky Vance.

(4) Defendant Sweets' request for a declaratory judgment allowing them to move that portion of the upper road that traverses their property is denied.

(5) Plaintiffs' claims for trespass against Defendants Sweet and Defendants Vance are dismissed.

(6) Plaintiffs Hoch are ordered to remove the excavation rock that was taken from Plaintiffs' property and deposited upon Defendants Sweet's property if they can obtain the cooperation of Defendants Sweet.

(7) Plaintiffs Hoch are ordered to remove the construction and other debris that has traveled from Plaintiffs' property onto Defendants Vance's property if they can obtain the cooperation of Defendants Vance.

(8) Plaintiffs' claim for assault against Defendants Sweets is hereby dismissed.

(9) Defendants Sweet and Defendants Vance are hereby permanently enjoined from preventing, or attempting to prevent, Plaintiffs exercise of their easement rights upon the upper road and upon that portion of Buckboard Lane that traverses the Vance property.

(10) Defendants Sweet's counterclaim for unjust enrichment is hereby dismissed.

(11) Plaintiffs claim for breach of covenants against Defendants Vance is hereby dismissed.

(12) Defendants Vance are hereby ordered to remove their *lis pendens* filing against Plaintiffs Hoch's property.

(13) Defendants Vance's claim against Plaintiffs for breach of covenants is hereby dismissed.

(14) The claim for attorney fees and costs sought by each and every party is hereby denied.

Dated this 9 day of July 2012.

JEFF M. BRUDIE, District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing FINAL JUDGMENT was:

__✓__ hand delivered via court basket, or Messenger Service

_____ mailed, postage prepaid, by the undersigned at Lewiston, Idaho, this 9th day of July 2012, to:

Theodore O. Creason
Samuel T. Creason
PO Drawer 835
Lewiston, ID 83501

Edwin L. Litteneker
PO Box 321
Lewiston, ID 83501

W. Jeremy Carr
PO Drawer 285
Lewiston, ID 83501

PATTY O. WEEKS, CLERK

By: _____
Deputy

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY
EX-OFFICIO
AUDITOR AND RECORDER
STATE OF IDAHO

W. JEREMY CARR
CLARK and FEENEY
Idaho State Bar # 6827
1229 Main Street
P.O. Drawer 285
Lewiston, ID 83501
Telephone: (208) 743-9516
Facsimile: (208) 746-9160
Attorneys for Defendants/Appellants,
Rob and Becky Vance

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCH and CAROLE D. HOCH, husband and wife, Plaintiffs/Respondents, vs. JAKE SWEET and AUDREY SWEET, husband and wife; ROB VANCE and BECKY VANCE, husband and wife, Defendants/Appellants.	**Case No. CV 2008-02272** **NOTICE OF APPEAL** Fee Category: L Fee Amount: $101.00

TO: THE ABOVE NAMED RESPONDENTS, JOHN M. HOCH and CAROLE D. HOCH, HUSBAND AND WIFE, AND THEIR ATTORNEY, THEADORE O. CREASON, 1219 Idaho Street, P.O. Drawer 835, Lewiston, Idaho 83501;

AND TO: THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellants, ROB VANCE and BECKY VANCE, husband and wife, appeal against the above-named Respondents, JOHN M. HOCH and CAROLE D. HOCH, husband and wife, to the Idaho Supreme Court from the *Memorandum Decision and Order* entered in the above entitled action on December 23, 2009, by the Honorable John Bradbury, and the

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Findings of Fact, Conclusions of Law, and Order entered in the above entitled action on February 9, 2012, by the Honorable Judge Jeff M. Brudie, presiding, and the *Final Judgment* entered on July 9, 2012, by the Honorable Judge Jeff M. Brudie.

2. The party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(a)(1) I.A.R.

3. A preliminary statement of the issues on appeal which the Appellants intend to assert in the appeal include the following:

(a) Did the District Court error in granting Respondents' motion for summary judgment?

(b) Did the District Court error in determining that "Buckboard Lane" was an "existing roadway" at the time Jack Cridlebaugh conveyed his property to the Appellants?

(c) Did the District Court error in denying Appellants' motion in limine?

(d) Did the District Court error in admitting Jack Cridlebaugh's deposition into evidence?

4. There has been no order entered sealing all or any portion of the record.

5. (a) A reporter's transcript has been requested and the estimated fee has been paid.

(b) The Appellants request the preparation of the reporter's standard transcript as defined in Rule 25(c) I.A.R. of the trial held on December 12, 13, and 14, 2011 in both hard copy and electronic format.

6. The Appellants request the following documents to be included in the Clerk's record in addition to those automatically included under Rule 28, I.A.R.:

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CLARK AND FEENEY, LLP
LEWISTON, IDAHO 83501

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Date	Document
10/21/2009	Plf's Motion for Summary Judgment
10/21/2009	Memorandum in Support of Plf's Motion for Summary Judgment
11/19/2009	Affidavit of Jake Sweet
11/19/2009	Def's Jake and Audrey Sweet's Reply Memorandum to Plf's Motion for Summary Judgment
11/23/2009	Def's Memorandum in Opposition to Motion for Summary Judgment
11/23/2009	Affidavit of Becky Vance in Support of Memo in Opposition to Motion for Summary Judgment
11/25/2009	Plf's Motion to Exclude Objectionable Testimony Submitted by the Affidavits of Jake Sweet and Becky Vance
11/25/2009	Plf's Reply to Def's Jake and Autrey Sweet's Reply Memo to Plf's Motion for Summary Judgment and Defs' Vance's Memo in Opposition to Motion for Summary Judgment
12/14/2011	Exhibit 109, Transcript of Preliminary Hearing
12/14/2011	Exhibit 108, Deposition of Jack Cridlebaugh

7. The Appellants request the following documents, charges, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: **All exhibits admitted into evidence.**

8. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address:
Linda Carlton
Nez Perce County Courthouse
P.O. Box 896
Lewiston, Idaho 83501

LAW OFFICES OF
CLARK AND FEENEY, LLP
LEWISTON, IDAHO 83501

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(b) That the clerk of the district court has been paid the estimated fees for preparation of the designated reporter's transcript.

(c) That the estimated fee for preparation of the clerk's record has been paid.

(d) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED this 24th day of July, 2012.

CLARK and FEENEY

By: _____
W. Jeremy Carr, a member of the firm.
Attorneys for Defendants/Appellants
Rob and Becky Vance

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of July, 2012, I caused to be served a true and correct copy of the foregoing document, by the following:

Theodore O. Creason Creason, Moore, Dokken & McIntosh PO Drawer 835 Lewiston, ID 83501	☐ U.S. Mail ☑ Hand Delivered ☐ Overnight Mail ☐ Telecopy
Edwin L. Litteneker Attorney at Law PO Box 321 Lewiston, ID 83501	☐ U.S. Mail ☑ Hand Delivered ☐ Overnight Mail ☐ Telecopy
Linda Carlton Court Reporter PO Box 896 Lewiston, ID 83501	☐ U.S. Mail ☑ Hand Delivered ☐ Overnight Mail ☐ Telecopy

By: _____
W. Jeremy Carr, Attorneys for Defendants/Appellants
Rob and Becky Vance

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCK and CAROLE D. HOCH, husband and wife, Plaintiffs-Respondents, v. ROB VANCE and BECKY VANCE, Husband and wife, Defendants-Appellants, And JAKE SWEET and AUDREY SWEET, Husband and wife, Defendants.	SUPREME COURT NO. 39788 CERTIFICATE OF EXHIBITS

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County, do hereby certify that the following is the list of the exhibits offered or admitted and which have been lodged with the Supreme Court or retained as indicated:

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Court this 12 day of September 2012.

PATTY O. WEEKS, Clerk

By DeAnna P. Grimm
Deputy

Exhibit Summary
Case: CV-2008-0002272
John M Hoch, etal. vs. Jake Sweet, etal.
Sorted by Exhibit Number

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
1	Defendants Sweet Exhibit A -- Photograph--showing berm across road (photo taken 11-13-08) Admitted: 6-22-10	Admitted	Exhibit Vault		
		Assigned to:	Litteneker, Edwin L		
2	Defendants Sweet Exhibit B -- Photograph -- showing machinery blocking road (photo taken 9-6-08) -- Admitted: 6-22-10	Admitted	Exhibit Vault		
		Assigned to:	Litteneker, Edwin L		
3	Plaintiffs' Exhibit #1 -- Large arial Photograph submitted as an illustrative Exhibit at the otsc/contempt hearing in front of Judge Bradbury on 6-22-10 -- Admitted again at Court Trial: 12-12-11	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
4	Plaintiffs' Exhibit #2 -- Arial photograph showing properties Admitted : 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
5	Plaintiffs' Exhibit #3-- Arial Photograph showing Hoch, Sweet, Vance, McKenna & Cridlebaugh properties "2009" -- Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
6	Plaintiffs' Exhibit #4 -- Arial Photograph showing Hoch, Sweet, Vance, McKenna & Cridlebaugh properties "2007" Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
7	Plaintiffs' Exhibit #4A -- (A copy of Plaintiffs' exhibit #4 that Mr. Hoch used a yellow highlighter on the stand to depict where the shot rock was placed) Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
8	Plaintiffs' Exhibit #5-- Arial Photograph of area with houses and roads depicted "2007" Admitted: 12-12-11	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
9	Plaintiffs' Exhibit #5A --(A copy of Plaintiffs' exhibit #5--Mr. Litteneker drew on impovement lines on roads during witness Mr. Flowers' testimony) Admitted: 12-13-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
10	Plaintiffs' Exhibit #6 -- Arial photo area (Sweet House is there, Hoch and Vance houses have not been built yet) "2004" Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
11	Plaintiffs' Exhibit #6-A --(A copy of Plaintiff's exhibit #6 that Mr. Flowers drew on access roads and exhibit 24 road and exhibit 25 road while a witness on the stand) Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
12	Plaintiffs' Exhibit #7 -- Arial photograph of area before any houses were built "1998" Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
13	Plaintiffs' Exhibit #8 -- Topographical Map of Area Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
14	Plaintiffs' Exhibit #9 -- Topographical Map of Area Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
15	Plaintiffs' Exhibit #10 -- Nez Perce County Idaho 2004 Rural Street Atals Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
16	Plaintiffs' Exhibit #10-1 -- Township Map of Area with Street Names Admitted: 12-12-11 Court Trial	Offered Assigned to:	Exhibit Vault Creason, Theodore O		
17	Plaintiffs' Exhibit #11 -- Photograph showing Cridlebaugh/Hoch road sign Admitted: 12-12-11	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
18	Plaintiffs' Exhibit #12 -- Photograph showing close-up view of Cridlebaugh/Hoch road sig Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
19	Plaintiffs' Exhibit #13 -- Photograph of road looking SW Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
20	Plaintiffs' Exhibit #14 -- Photograph facing East -- Bulldozer on Section of Property between Hoch/Sweet property Admitted: 12-12-11	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
21	Plaintiffs' Exhibit #15 -- Photograph showing position of bulldozer near Sweet's property. Photographer facing South Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
22	Plaintiffs' Exhibit #16 -- Photograph showing white pick-up, trailer and bulldozer in roa Admitted: 12-12-11	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
23	Plaintiffs' Exhibit #17 -- Photograph showing newly surveyed property line, berm and red stake Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
24	Plaintiffs' Exhibit #18 -- Photograph showing road near Hoch's home Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
25	Plaintiffs' Exhibit #19-- Photograph showing road near Hoch home. Shows shed, pile of wood and trailer Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
26	Plaintiffs' Exhibit #20 -- Photograph showing road near Hoch home looking west. Shows trailer and wood piles Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
27	Plaintiffs' Exhibit #21 -- Photograph showing showing same scene as Plaintiffs' exhibit #20 only a close-up view of trailer Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
28	Plaintiffs' Exhibit #22 -- Photograph showing trailer and small storage shed that was on Cridlebaugh property and is now on Vance property Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
29	Plaintiffs' Exhibit #23 -- Photograph showing two pieces of equipment (plow and trailer) in closer detail Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
30	Plaintiffs' Exhibit #24 (a collective exhibit including #24-1 - #24-10) Photographs Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
31	Plaintiffs' Exhibit #25 (a collective exhibit including #25-1 - #25-7) Photographs Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
32	Plaintiffs' Exhibit #26 (a collective exhibit including #26, #26-1 - #26-44) Photographs showing new road (trail) Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		
33	Plaintiffs' Exhibit #27 -- Raymond Neal Flowers P.E. Curriculum Vitae Admitted: 12-12-11 Court Trial	Admitted	Exhibit Vault		
		Assigned to:	Creason, Theodore O		

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
34	Plaintiffs' Exhibit #28 -- Report of Raymond Neal Flowers, Civil Engineer Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
35	Plaintiffs' Exhibit #29 -- Photograph showing what Giese encountered when came to work at Hoch property. Dozer blocking road Admitted: 12-12-11 Court trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
36	Plaintiffs' Exhibit #104 -- Purchase Agreement (between Jack Cridlebaugh and Rob Vance and Becky Vance Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
37	Plaintiffs' Exhibit #105 -- Warranty Deed dated 10-12-00 Cridlebaugh to Vance Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
38	Plaintiffs' Exhibit #106 -- Warranty Deed dated 10-10-01 Cridlebaugh to Sweet Admitted: 12-12-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
39	Plaintiffs' Exhibit #107 -- Warranty Deed dated 3-26-02 Cridlebaugh to Hoch Admitted: 12-12-11	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
40	Plaintiffs' Exhibit #108 -- Designated Testimony, Deposition of Jack Cridlebaugh Taken on 4-15-09 Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
41	Plaintiffs' Exhibit #109 -- Sealed Transcript of Motion to Show Cause Hearing on 6-22-10 Honorable John Bradbury Presidin Admitted: 12-14-11 Court Trial	Admitted Assigned to:	Exhibit Vault Creason, Theodore O		
42	Defendants' Vance Exhibit #200 -- "1998" Arial Photograph Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
43	Defendants' Vance Exhibit #200A -- a copy of Defendants' exhibit #200 where witness Mr. Vance drew on exhibit designating lower road in orange & East-West Road in yellow at Court Trial Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
44	Defendants Vance Exhibit #201 -- "2004" Arial Photograph Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		

Exhibit Summary
Case: CV-2008-0002272
John M Hoch, etal. vs. Jake Sweet, etal.
Sorted by Exhibit Number

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
45	Defendants Vance Exhibit #202 -- "2007" Arial Photograph Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
46	Defendants Vance Exhibit #202-A -- a copy of Defendants Vance exhibit #202 where Mr. Vance drew Buckboard Lane at Court Trial Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
47	Defendants Vance Exhibit #203 -- Record of Survey Section 22, Township 33 North, Range 4 West, Boise Meridian, Nez Perce County, Idaho Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
48	Defendants Vance Exhibit #204 -- Survivable Space Plan -- Rob Vance Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
49	Defendants Vance Exhibit #205 -- Photograph of Vance Property Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
50	Defendants Vance Exhibit #206 -- Series of (3) Photographs marked A - C in lower right corner Vance/Hoch property line Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
51	Defendants Vance Exhibit #207 -- Series of (4) photographs marked A - D in lower right corner Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
52	Defendants Vance Exhibit #208 D & #208 G - L -- Photographs showing construction debris on Vance Property 2010 Admitted: 12-13-11 -- Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
53	Defendants Vance Exhibit #209 -- Series of (8) Photographs marked A - H in lower right corner Hoch property taken by Vance Admitted: 12-13-11 Court Trial	Admitted Assigned to:	Exhibit Vault Carr, William Jeremy		
54	Defendants Sweet Exhibit #5B -- Copy of Plaintiffs' exhibit #5 that Mr. Sweet drew on during Court trial Admitted: 12-14-11 Court Trial	Admitted Assigned to:	Exhibit Vault Litteneker, Edwin L		
55	Defendants Sweet Exhibit #305-A - #305-H -- Series of Photographs of Current Foute used by parties (upper road) they show various locations on upper road Admitted: 12-14-11 Court Trial	Admitted Assigned to:	Exhibit Vault Litteneker, Edwin L		

Exhibit Summary
Case: CV-2008-0002272
John M Hoch, etal. vs. Jake Sweet, etal.
Sorted by Exhibit Number

Number	Description	Result	Storage Location / Property Item Number	Destroy Notification Date	Destroy or Return Date
56	Defendants Sweet Exhibit #310-A - #310-W -- Photographs of Proposed Route to be used by parties Admitted: 12-14-11 Court Trial	Admitted Assigned to:	Exhibit Vault Litteneker, Edwin L		
57	Defendants Sweet Exhibit #313-A - #313-F -- Additional Photographs of damages to properties Admitted: 12-14-11 Court Trial	Admitted Assigned to:	Exhibit Vault Litteneker, Edwin L		
58	Defendants Sweet Exhibit #310-X -- Photograph of Proposed route to be used by parties -- Admitted for demonstrative purposes only: 12-14-11 Court Trial	Admitted Assigned to:	Exhibit Vault Litteneker, Edwin L		

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCK and CAROLE D. HOCH, husband and wife, Plaintiffs-Respondents, v. ROB VANCE and BECKY VANCE, Husband and wife, Defendants-Appellants, And JAKE SWEET and AUDREY SWEET, Husband and wife, Defendants.	SUPREME COURT NO. 39788 CLERK'S CERTIFICATE

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that the foregoing Clerk's Record in the above-entitled cause was compiled and bound by me and contains true and correct copies of all pleadings, documents, and papers designated to be included under Rule 28, Idaho Appellate Rules, the Notice of Appeal, any Notice of Cross-Appeal, and additional documents that were requested.

I further certify

1. That all documents, x-rays, charts, and pictures offered or admitted as exhibits in the above-entitled cause, if any, will be duly lodged with the Clerk of the Supreme Court with any Reporter's Transcript and the Clerk's Record as required by Rule 31 of the Idaho Appellate

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court this 12 day of September 2012.

PATTY O. WEEKS, Clerk

By _____
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

JOHN M. HOCK and CAROLE D. HOCH, husband and wife,	
Plaintiffs-Respondents,	
v.	
	SUPREME COURT NO. 39788
ROB VANCE and BECKY VANCE, Husband and wife,	
Defendants-Appellants,	CERTIFICATE OF SERVICE
And	
JAKE SWEET and AUDREY SWEET, Husband and wife,	
Defendants.	

I, DeAnna P. Grimm, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Nez Perce, do hereby certify that copies of the Clerk's Record and Reporter's Transcript were delivered to W. Jeremy Carr, 1229 Main St., Lewiston, ID 83501 and Theodore Creason, 1219 Idaho St., Lewiston, Id 83501 by Valley Messenger Service, this 17 day of Sept~~ember~~ Oct 2012.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 17 day of Sept~~ember~~ Oct 2012.

PATTY O. WEEKS
CLERK OF THE DISTRICT COURT

By DEANNA P. GRIMM
Deputy Clerk

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